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IN THE

Supreme Court of the United States

October Term, 1968

No. 1169

NATIONAL TRAILER CONVOY, INC.,
MORGAN DRIVE AWAY, INC.,
NATIONAL TANK TRUCK CARRIERS, INC.,
and
REGULAR COMMON CARRIER CONFERENCE of
American Trucking Associations, Inc.,

v. *Appellants,*

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION
and
GRIFFIN MOBILE HOME TRANSPORTING CO.,

Appellees.

Appeal From the United States District Court for the Northern District of Oklahoma

JURISDICTIONAL STATEMENT

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Appeal From the United States District Court for the Northern District of Oklahoma

JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the United States Distict Court for the Northern Distict of Oklahoma entered on November 21, 1968, affirming an order of the Interstate Commerce Commission, and submit this statement to show that the Supreme Court has jurisdiction of the appeal and that substantial questions are presented.

OPINIONS BELOW

The opinion, consisting of findings of fact and memorandum decision of the U. S. District Court for the Northern District of Oklahoma, from which this Appeal is taken, is reported at 293 F. Supp. 630, and is contained herein as Appendix A, pages 1a to 6a.

A prior opinion of that court remanding the case to the Interstate Commerce Commission is reported at 227 F. Supp 730, and is contained herein as Appendix B, pages 7a to 17a.

The opinion of the Interstate Commerce Commission which was remanded by the prior Distict Court decision is reported at 91 M.C.C. 801, and is contained herein as Appendix C, pages 18a to 35a. The opinion of the Interstate Commerce Commission on Reconsideration (which was affirmed by the decision presently appealed from) is reported at 103 M.C.C. 482, and is contained herein as Appendix D, pages 36a to 68a.

JURISDICTION

This suit was brought under 28 U.S.C. 1336, 1398, 2284 and 2321-2325 to set aside orders of the Interstate Commerce Commission issued in a proceeding styled Docket No. MC-124190 *Grffiin Mobile Home Transporting Co.-Common Carrier Application.* The judgment of the District Court was entered on November 21, 1968, and notice of appeal was filed in that Court on January 17, 1969. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C. 1253. The following recent decisions sustain the jurisdiction of the Supreme Court to review the decision in this case; *Penn-Central Merger and N. & W. Inclusion*

Cases, 389 U.S. 486, and *United States* v. *Dixie Highway Express, Inc. et al., Braswell Motor Freight Lines, Inc. v. Dixie Highway Express, Inc.* 389 U.S. 409.

QUESTIONS PRESENTED

1. Whether, in construing the term "transportation" under Part II of the Interstate Commerce Act, the Commission and the court below are free to depart from a decision of this Court construing the identical term under Part I of the same Act.

2. Whether, by deferring to the Commission's expertise on transportation facts, the court below abdicated its duty to interpret transportation law.

3. Whether in reaching its decision the court improperly construed the history and purposes of Sections 203(a) (15) and 209(b) of the Act and encouraged vast mischief in its administration.

STATUTES INVOLVED

Sections 1(3)(a) (in pertinent part), 203(a)(15), 203(a)(19) and 209(b) of the Interstate Commeree Act, as amended, (49 U.S.C. 1(3)(a), 303(a)(15), 303(a)(19) and 309(b)) are set forth in Appendix F attached hereto, pages 85a to 87a.

STATEMENT OF THE CASE

Appellee Griffin Mobile Home Transporting Co. filed an application before the Interstate Commerce Commission pursuant to Section 203 (a)(15) and 209(b) of the Interstate Commerce Act for a permit as a contract carrier of mobile homes between points in Oklahoma, on the one hand, and, on the other, points in 33 specified states. Appellants National Trailer Convoy, Inc. (National) and Morgan Drive Away, Inc. (Mor-

gan) are motor common carriers holding authority from the Commission, *inter alia,* to transport mobile homes throughout the territory covered by the application. These appellants and others appeared in opposition at the hearing which was held before an examiner. Appellants National Tank Truck Carriers, Inc. and Regular Common Carrier Conference of American Trucking Associations, Inc., are associations of motor carriers engaged in the transportation of property in interstate and foreign commerce under authority issued by the Interstate Commerce Commission. Upon separately filed petitions to the Commission they were granted leave to intervene and thereafter participated in the proceeding.

At the hearing, applicant Griffin proposed, in addition to the transportation of mobile homes, to perform the following extra services:

(a) repair damaged trailers before towing them,

(b) connect electrical and plumbing facilities at destination,

(c) set up expando trailers.[1]

Following the hearing, the examiner recommended that the application be denied. He found applicant's proposal involved "accessorial services which go beyond what is required of carriers to meet the requirements of the public interest and the national transportation policy . . ."; that applicant's proposal "is geared to the promotion and selling of trailers" rather than transportation and that "there appears to be considerable merit in protestants' arguments that certain of

[1] Expando trailers can be expanded to larger dimensions at destination points or folded up to achieve minimum dimensions for towing on the highways.

the accessorial services to be performed by applicant exceeded those normally connected with transportation."[2]

Exceptions were filed to the recommended report. Thereafter, in a decision designated by the Commission as involving an issue of general transportation importance and reported at 91 M.C.C. 801 (attached hereto as Appendix C) the Commission, Division 1, granted the application. In reaching its conclusion, the Commission gave weight to applicant's proposal to provide the above-mentioned extra sevices. Upon review of this Commission decision, the United States District Court for the Northern District of Oklahoma rendered an opinion reported at 227 F. Supp. 730 (Appendix B herein) which set aside the Commission's order and remanded the decision to the Commission for further action in accordance with the views expressed in the decision. The court, at 227 F. Supp. 731 stated the issue to be:

> "Whether in acting upon an application for a contract carrier permit, the Commission may give consideration to non-transportation services needed by shippers and offered by applicants."

The court also found that only transportation services may be considered in a proceeding under Section 209(b) and that activities related to sale are beyond the scope of transportation (227 F. Supp. at 734).

Upon reconsideration in light of the court's opinion, the entire Commission rendered its Report on Reconsideration dated September 30, 1966, 103 M.C.C. 482 (attached hereto as Appendix D). With one com-

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[2] The recommended report of the examiner is attached hereto as Appendix E.

missioner dissenting, two commissioners dissenting in part in a separate statement, and two commissioners concurring in part in a separate statement, the Commission again concluded that the application should be granted. Two commissioners disagreed with the conclusion that the expando and utility connection services are transportation services (103 M.C.C. at 506); one concurring commissioner would hold utility connections to be a non-transportation service (103 M.C.C. 505) and the other concurring commissioner appears to believe that setting up expando trailers is sometimes a non-transportation service (103 M.C.C. 505-6). After all administrative remedies were exhausted before the Commission, the instant suit was filed. In the decision below, the District Court affirmed the Commission's finding that the extra services proposed by applicant were "transportation" services, and concluded that the Commission properly gave weight to such services under Section 203(a)(15) (49 U.S.C. 303(a)(15)) of the Act as "designed to meet the distinct needs of each individual customer." From that decision, this appeal is taken.

THE QUESTIONS ARE SUBSTANTIAL

1. This case presents an important and novel question as to whether the long-standing entry controls contained in Part II of the Interstate Commerce Act (the Motor Carrier Act) 49 U.S.C. 301 et seq. may be circumvented by an applicant's offer to perform services beyond the receiving, transporting and delivering of property. At issue here is the construction to be accorded the term "transportation" and the proper definition of services embraced within that term. It is difficult to conceive of a question more important to the administration of the Interstate Commerce Act.

Here, a contract carrier applicant was granted a permit to transport mobile homes—not because of any demonstrated need for the "transportation" of the mobile homes—but rather on the basis of its offer to perform extra services consisting of:

(a) repairing damaged trailers before towing them,

(b) connecting the electrical and plumbing facilities at destination, and

(c) setting up "expando trailers".

This case is the first in which a carrier was granted authority on the basis of an offer to perform services so remote to the receiving, transporting and delivering of goods. These extra services had not previously been required by the Commission of carriers serving the mobile home industry and consequently were not offered by petitioners Morgan and National as part of their line haul transportation service.[3] Notwithstanding the absence of a rule on the subject [4] the Commission classi-

[3] By appropriate tariff provisions, petitioners do offer to make arrangements with skilled artisans to perform these extra services when requested by the shipper. Indeed, in many states the function of connecting utilities may be performed only by licensed electricians and plumbers. cf. *Hintze Common Carrier Application,* 107 M.C.C. 348 (1968).

[4] The mischief inherent in this approach instead of proceeding by rule-making was summarized in the dissenting opinion, as follows (103 M.C.C. at 506): "It seems clear that the point has been reached where a full rulemaking proceeding should be conducted for the purpose of determining what services are transportation services and what are nontransportation services. Pending a decision in such proceeding, those services which can reasonably be considered to fall in the 'doubtful' category should not be characterized as transportation services."

fied these extra services as "transportation" because it found them ". . . incidental to the movement of the house trailers from one place to another and . . . necessary to the complete effectuation of the matter in chief." 103 M.C.C. 501. This Commission definition of "transportation service" is so vague and ambiguous as to be incapable of precise application in any given factual context and could qualify any extra service as "transportation" at the whim of the decision maker. Indeed, this was recognized by at least three of the Commissioners who participated in the decision. Commissioner Murphy, while concurring in the result, stated:

> "The fact that the majority has decided to encumber this decision by giving weight to all the various extra services lends credence to the concern that almost any proposed service will be similarly considered and that entry controls imposed by Congress in order to forestall ruinous competition among motor carriers will be diluted by the necessity to grant applications based upon novel features of infinite variety." (103 M.C.C. at 505)

And the dissent of Commissioners Bush and Tuggle states:

> "Going as far as the majority has in this case could completely destroy any line between transportation and non-transportation services. Any number of reasonably comparable "extra services" might be offered by future applicants, and I anticipate they will be so proposed. Under the precedent established by this decision, how could we say 'no'?" (103 M.C.C. at 506)

The distinction between transportation and non-transportation service was further obliterated by the

decision of the court below. Its opinion departs from the Commission's rationale but finds the Commission's result justifiable in terms of Section 203(a)(15) of the Act, 49 U.S.C. 303(a)(15), which defines a contract carrier, in part, as one who provides "transportation services designed to meet the distinct needs of each individual customer." Since the issue was whether the Commission should have considered the extra services as "transportation" the court's conclusion on this point begs the question. The court below also attempts to justify the result under section 203(a)(19) of the Act. (49 U.S.C. 303(a)(19))—a provision not mentioned in the Commission decision—which simply describes the equipment (vehicles, facilities and property) or "the performance of any service in connection therewith" covered by the provisions of Part II of the Act. The court's reading of this section at 293 F. Supp. 63 does violence to its plain language and legislative history.[5]

Moreover, the decisions of the Commission and the court below as to "transportation service" are in direct conflict with a decision of this Court. In *Baltimore & O. R. Co.* v. *United States,* 305 U.S. 507, the Supreme Court affirmed a Commission finding that in-transit warehousing voluntarily offered by rail carriers was not "transportation", and rejected a carrier contention that charges for storage-in-transit are not ware-

[5] "The definition of 'services' and transportation' is intended to cover all facilities owned and used by motor carriers. The changes made by the (Senate) Committee remove any possibility of a construction which would include the facilities of shippers or others which the motor carriers may use for pickup or delivery of shipments." Senator Wheeler, commenting on 203(a)(19), reported at 79 Cong. Rec. 5651 and 5878, April 15, 1935.

housing costs but transportation costs. This Court stated (305 U.S. 507, 525-26):

> "The Commission found that the in-transit warehousing was not a part of transportation. This finding is not affected by the determination of the Commission that the rates and charges should be published in the tariffs. Indeed, in its report on the subject the Commission said 'What is here condemned is the fact that the respondents have voluntarily engaged in storage and warehousing services which are not within their common-carrier obligations and, by providing such services to shippers below the cost of such services, reduce the cost to such shippers for the transportation of their goods. The tariffs now on file are instruments which work violations of the act in that, through them, respondents hold themselves out to perform commercial services (under the guise of performing transportation services) at rates and charges which fail to compensate respondents for the cost of performing them, and thereby violate sections 2, 3, and 6 of the act.'
>
> "We accept this conclusion. If the service is non-transportation, the fact that it is in a tariff does not save it from the condemnation of Section 6(7)."

The Commission decision which was affirmed in *Baltimore & O. R. Co.* v. *United States,* 305 U.S. 507 announced the following standard for distinguishing "transportation" from extra services offered by carriers:

> "*There are many services and acts,* including storage and handling of goods, *which are necessary in or incidental to the convenience of goods by* rail from one locality to another, *which are not a part of transportation as defined in section 1.* A clear distinction should be made between voluntary or

> commercial storage ordinarily performed by a warehouse and the involuntary storage which carriers subject to the act are *obligated to perform*. Our duty, under the circumstances here involved, requires us to determine when transportation as defined in the act begins and ends, and to determine whether acts or services incident to the conveyances of goods from one point to another are or are not a part of transportation which common carriers subject to the Interstate Commerce Act are obligated to perform." (Emphasis added) *Propriety of Operating Practices—New York Warehousing*, 198 I.C.C. 134, 216 I.C.C. 291, 270 I.C.C. 102 (at 216 I.C.C. 348).

Thus, the key to determining whether a particular service is embraced within the term "transportation" as used in the Act is whether the service constitutes a necessary step in the performance of the line-haul transportation which the carrier is obligated to perform. The standards here adopted by the Commission and the court below for determining what is "transportation" under the Act are in direct conflict with the *New York Warehousing* case. Had the *New York Warehousing* standard been applied here—as it should have been—the extra services proposed by applicant would have been ignored as "not a part of transportation." If *in-transit warehousing* is "not a part of transportation" how can *pre-transit repairs* and *post-transit utility connections* be considered a part of "transportation?" Mobile home carriers are not "obligated to perform" these services.

The proposition that not every service rendered in conjunction with transportation qualifies as a "transportation service" has long been settled. The *New York Warehousing* "obligated-to-perform" test

was applied in *Walling* v. *Baltimore Steam Packet Co.*, 144 F.2d 130, 134 (1944) where the court said:

> "The phrase 'services in connection with' is used in sections 1 (3), 6 (7) and 15 (13) of the Interstate Commerce Act, 49 U.S.C.A. §§ 1 (3), 6(7), 15(13); and as so used, it has uniformly been construed to mean service rendered while a shipment is in the custody and control of the carrier or service which the carrier is legally obligated to perform. Thus service is not rendered 'in connection with transportation' in the case of the spotting of cars on an industrial siding (United States v. Wabash R. Co., 321 U.S. 403, 64 S.Ct. 752; United States v. American Sheet & Tin Plate Co., 301 U.S. 402, 57 S.Ct. 804, 81 L. Ed. 1186); nor in maintaining offices, advertising the railroad or soliciting traffic over it (Lehigh Valley R. Co. v. United States, 243 U.S. 444, 37 S.Ct. 434, 61 L.Ed. 839); nor in towing car floats to point of shipment, Pennsylvania R. Co. v. M. McGirr's Sons Co., 2 Cir., 287 F. 334."

The Commission itself has recognized and adhered to the holding of the *Walling* case. See *Eastern Central M. Carriers Assn.* v. *Baltimore & O. R. Co.* 314 I.C.C. 5, 47 (1961), and that decision was sustained in *Cooper-Jarrett, Inc.* v. *United States,* 226 F. Supp. 318, 322 (1964), aff'd. 379 U.S. 6, wherein the lower court specifically followed the *Walling* case.

What is surprising is that the Commission's decision here recognizes its *New York Warehousing* precedent as "the controlling decision as to the meaning of the word 'transportation' under part I of the Act," (103 M.C.C. 486) and states (at 103 M.C.C. at 487):

> ". . . the fundamental principles there approved have received judicial sanction, are well known in transportation circles, and may readily be ap-

plied as an aid in resolving difficult questions in this area whether they arise under part I or part part II of the act."

Having said this, the Commission then totally ignores the teaching of *New York Warehousing* in the next 20 pages of its opinion. Nothing in Part II of the Act supports the diametrically opposite result reached here. On the contrary, since the term "transportation" under Part I is defined more broadly than under Part II,[6] a service which does not qualify as "transportation" under the Part I standard, would, *a fortiori,* not pass muster under Part II. If the decisions below are allowed to stand, a conflict with settled law will result, the Commission's jurisdiction will be enlarged without Congressional sanction (by allowing consideration of service gimmicks not properly a part of "transportation") and the door will be open to similar applications in which extra service gimmicks will be substituted for proof of need for "transportation" service.[7]

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[6] Section 1(3)(a) of the Act, 49 U.S.C. 1(3)(a) defines "transportation" as follows:

> "The term 'transportation' as used in this part shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities of shipment or carriage, irrespective of ownership or of any contract, express, or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported".

Section 203(a)(19), 49 U.S.C. 303(a)(19) describes the "services" and "transportation" to which Part II applies with reference to vehicles and facilities operated by the carrier. See "Appendix F hereto.

[7] It is interesting to note that nothing in the permit granted by the Commission *requires* applicant Griffin to perform the extra services promised as a means of securing the permit. Griffin with impunity can refuse to perform these services.

2. The decision below accords to the expertise of the Commission more than is accorded by law. Appellants recognize that the expertise of the Commission in making determinations of fact is wide and, if based upon substantial evidence, is not the subject of much more than cursory judicial review. The court below, however, did not stop with the application of this principle but proceeded to enunciate a new principle, hitherto unknown, the effect of which is the abdication by the court of its authority to interpret matters of law as distinguished from matters of fact.

What was before the court below was a question of the interpretation of a statute. While the Interstate Commerce Commission is, as that court recognized, "charged with responsibility for the administration of the Act," (293 F. Supp. at 634) the court errs when it accords to the Commission greater expertise than is possessed by the court in the legal interpretation of "critical language in a statutory scheme." (293 F. Supp. at 633)

In its first decision the court had articulated one criterion by which it proposed that the Commission be governed and that was the determination that the Commission could lawfully consider only "transportation" requirements as distinguished from "sale" or other requirements. But it noted that the final review of what the statute means by "transportation" is for the judiciary.

Since the statute directed the Commission to base its decision on "transportation" requirements, the determination here was in effect a delineation of the stautory limits of the Commission's power to act. This is a judicial function.

The failure of the court below to recognize and discharge this function is in conflict with principles of administrative law approved by this Court in *Social Security Board v. Nierotke,* 327 U.S. 358, in which the Court said (327 U.S. at 369):

> "Administrative determinations must have a basis in law and must be within the granted authority. . . . An agency may not finally decide the limits of its statutory power. That is a judicial function . . . ."

The Court then concluded:

> ". . . the Board's interpretation of this statute to exclude back pay goes beyond the boundaries of administrative routine and the statutory limits."

Simply stated, while deference is due the Commission in the exercise of its fact finding process, there is no basis for undue deference where statutory construction is the consideration before the reviewing court. It is in the courts, not in the Commission, that the ultimate expertise in matters of law must reside. Since the court below surrendered its prerogative to the Commission, it should be retrieved by the Supreme Court.

3. The decision of the court below gives no evidence of consideration of the Congressional objectives underlying Sections 203 (a) (15) and 209(b) of the Act. (49 U.S.C.A. 303(a)(15) and 309(b)) Yet these objectives are of paramount importance in this case. For if the action of the Interstate Commerce Commssion was inconsistent therewith, its decision is clearly unlawful and arbitrary and constitutes an abuse of discretion, and approval thereof by the court below is manifestly in error.

That the objective of Congress in passing the 1957 amendments to the Interstate Commerce Act was to

protect common carriers is clear. The Senate Report embodying the views of the Committee which held hearings on the bill that, as amended, became law, concludes with this paragraph:

> "Your committee is of the opinion that the public interest in a sound transportation system, and particularly in a stable and adequate system of common carriage, in the light of the objectives of the national transportation policy require that the bill, as amended, be passed." [8]

The court below in actual fact merely accepted what the Commission did, and itself failed both to interpret the law and to evaluate the Commission's interpretation thereof. The critical paragraph of the opinion below in this connection appears in these words:

> "As we have seen, one of the prime purposes of the contract carrier provisions of the Interstate Commerce Act, as gleaned from Section 203(a)(15), is to provide 'transportation services designed to meet the distinct need of each individual customer.' The statute does not require that these services be necessary but rather that they be designed to meet individualized transportation needs. The terms 'services and transportation' are defined 'to include all vehicles . . . together with all facilities and property . . . used in the transportation of passengers or property . . . or *in the performance of any service in connection therewith.*' [emphasis added] 203 (a)(19). The services offered by Griffin meet all of these tests in that as a whole, they were designed with the specific transportation needs of the supporting shippers and dealers in mind and thus qualify under the Act as 'transportation services.'" (293 F. Supp. at 634)

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[8] Senate Report No. 703, July 24, 1957, U.S. Cong. News '57, p. 1605.

The quoted paragraph from the court's opinion contains two obvious errors. The first is that "one of the prime purposes of the contract carrier provisions of the Interstate Commerce Act . . . is to *provide* 'transportation service designed to meet the distinct need of each individual customer.'." This interpretation overlooks the fact that Section 203(a)(15) is merely a definitional provision and serves to define or determine whether the transportation service in question is contract carrier in nature. There was no effort on the part of Congress, and nothing in the legislative history, to indicate that a "prime" purpose of the amendments is to "provide transportation." Transportation was not shown to be in short supply. It is eminently clear, however, that Congress did undertake to identify, describe and limit the nature of the transportation that contract carriers may perform. And that transportation, the statute says, to be contract in nature, must, as relevant here, be designed or tailored to meet the "distinct need" of the customer. But, first, the service must be "transportation."

The second obvious error in the quoted paragraph is that the court has accepted without question the Commission's interpretation of the term "transportation services" and has thus embraced within that term, as shown earlier herein, services which have no relation to transportation as that term has been interpreted by the Commission, and by this Court.

Overlooked by both the Commission and the court below is the position of the Commission in *New York Warehousing, supra,* affirmed by this Court in *Baltimore & O. Ry. Co. v. United States, supra,* wherein the Commission said that there are many services and acts which are necessary in or incidental to the conveyance of goods which are not a part of transportation.

Thus the Commission, though acknowledging the principle established by it in *New York Warehousing,* and upheld by the Supreme Court, and recognizing its value (103 M.C.C. at 487) completely abandoned that principle. The court below, without testing the Commission's interpretation of the statute, merely accepted what the Commission did.

It becomes important to note that the Commission interpreted the word "transportation" to mean the same for common carriers as for contract. In its decision in this case, noting the legislative history of the evolution of "transportation" it said, at 103 M.C.C. 485:

> "This definition applies equally to common and contract carriers by motor vehicle and it may not be applied differently to either class of carriage. *what is 'transportation,' therefore, must mean the same for both common and contract carriers alike.*" (Emphasis added)

It makes no difference, then, in interpreting the term "transportation" that the services proffered by applicant Griffin may have differed from the services offered by some common carriers. The question is whether those services may lawfully be considered to fall within the term "transportation," for the determination whether a permit (or certificate) is to be granted is a determination made upon the "transportation" services which an applicant proposes to render. And if an applicant is to be granted operating authority on the basis of service which is not a transportation service there can be no certainty or guideline by which opposing carriers, whether contract or common, may know the "rules of the game" or the ambit or direction, of regulatory policy. The question

is not so much whether the particular applicant should be granted the rights in question upon a proper showing by it, but whether the tests by which his application is measured are known, understood, consistent and lawful. The subject was helpfully discussed by Judge Friendly in "The Federal Administrative Agencies—The Need for Better Definition of Standards" (1967) in these words:

> "A prime source of justified dissatisfaction with the type of federal administrative action which I will shortly specify is the failure to develop standards sufficiently definite to permit decisions to be fairly predictable and the reasons for them to be understood; this failure can and must be remedied." (pp. 4-5; footnote omitted.)
>
> "A second reason for definite standards of administrative adjudication is the social value in encouraging the security of transactions. An airline considering an investment of $100,000,000, in additional jet transports, which it thinks necessary to give adequate service on its routes over a decade, ought to have some notion whether it will be allowed to serve the existing and anticipated traffic, along with other airlines then certificated, or whether its very success in traffic development will become the basis for additional authorizations. So ought the lenders who will be providing most of the money. A trucker contemplating the purchase of a new fleet should know the degree to which he will or will not be protected from rate-cutting by other truckers or by competing modes of transportation. Although no such assurances are afforded in unregulated sections of the economy, a greater degree of predictability is a proper offset for some of the hampering effects of regulation." (p. 20, footnote omitted.)

The court below properly places particular emphasis upon that portion of the 1957 amendments which

refers to the "distinct need" of the shipper but improperly treats it as a transportation need, regardless of whether it is such a need in light of the statute and of interpretations relied upon by the Commission and confirmed by the Supreme Court. The only "distinct need" which can qualify as a criterion or standard undergirding a grant of contract carrier authority is a "transportation" need.[9] This basic principle the Commission sidestepped, and the court below merely adopted what the Commission had done, thus abandoning its own role of interpreter of the law.

Unique in the situation and aggravating the problem confronting appellants here is a decision by the court below, *National Trailer Convoy, Inc. v. United States,* 293 F. Supp. 634 (1968), (reached on the very day of the decision here challenged) in which the Commission had granted to a common carrier applicant a certificate to transport mobile homes—the commodity involved in the instant contract carrier case. There a common carrier applicant, Martin Trailer Toters, Inc., had offered to render ordinary transportation, and, as "extras," to provide the inflation of mobile home tires by an air compressor, and the use of a winch to move such home trailers in and out of mud and soft ground. But the court below struck down the grant, remanding the case to the Commission. The only distinction offered by the court lies in the definitional differences

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[9] This principle was recognized by the initial decision of the court below which remanded the case to the Commission. The opinion by Judge Breitenstein states:

> "The language is plain and unambiguous. The contracts are to furnish transportation services. Such services, and only such services, are to meet the distinct needs of the customers. The reference to transportation services restricts and limits the language which follows." (227 F. Supp. 732)

between common and contract carriers. In effect, the court held that "transportation" is to be given different meanings, depending upon who performs it. By so doing the court reached a conclusion diametrically opposed to that of the Commission as expressed in the language quoted above. (103 M.C.C. at 485)

While overlooking its Constitutional role as statutory interpreter the court below also overlooked the real basis for the 1957 amendments which, as shown earlier by quotation from the Senate Committee Report, is basically to preserve the public interest in a stable and adequate system of common carriage in the light of the objectives of the Act and of the National Transportation Policy. That these objectives of the Act and of the Policy will be vitiated can readily be demonstrated. It takes no magic, but merely the exercise of imagination for a contract carrier applicant to propose any number or variety or range of extra services which are not normally rendered in order to constitute something different from what is presently available. The policy established by the Commission, and upheld by the court below, would invite precisely this sort of imaginative approach. With such an approach a contract carrier grant is virtually assured. The vast mischief perpetrated by the action here complained of was realistically seen by dissenting Commissioners Bush and Tuggle when, in their dissent they observed that future applicants offering novel nontransportation services could not be answered "no." (103 M.C.C. at 506)

CONCLUSION

The questions presented by this appeal have heretofore been designated by the Commission as involving an issue of general transportation importance. Such a designation is used sparingly by the Commission and applies only to precedent cases. Moreover, it was done here on the Commission's own motion. Appellants urge that in this particular the Commission was correct in recognizing that the case involves matters of importance far beyond the ordinary.

Further, the Commission appears to have announced a broad rule "affecting applications for motor carrier operating authority generally." (103 M.C.C. at 483)

THEREFORE, it is respectfully requested that for the reasons discussed in this Jurisdictional Statement this

Court note jurisdiction to the end that this appeal be docketed for plenary review, with briefs and argument.

Respectfully submitted,

NATIONAL TRAILER CONVOY, INC.
MORGAN DRIVE AWAY, INC.
NATIONAL TANK TRUCK CARRIERS, INC.
REGULAR COMMON CARRIER CONFERENCE OF AMERICAN TRUCKING ASSOCIATIONS, INC.

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Attorneys for Petitioners

DATED: March 18, 1969

APPENDIX A

UNITED STATES DISTRICT COURT
N. D. OKLAHOMA

No. 67-C-150

NATIONAL TRAILER CONVOY, INC., ET AL., *Plaintiffs*,

v.

UNITED STATES OF AMERICA, and INTERSTATE COMMERCE COMMISSION, *Defendants*.

Nov. 21, 1968

Action to enjoin and set aside Interstate Commerce Commission's granting of application for permit authorizing interstate operation as a contract carrier. The case was remanded to the Interstate Commerce Commission for further findings, 227 F.Supp. 730. On review after remand, the District Court, Murrah, Circuit Judge, held that interstate contract motor carrier applicant's proposed services of making repairs to damaged mobile homes before towing them, connecting electrical and plumbing facilities when delivering homes to an owner's or dealer's lot and setting up "expando trailers" constituted "transportation services" within meaning of the contract carrier provisions of the Interstate Commerce Act.

Affirmed.

Gable, Gotwals, Hays, Rubin & Fox, Tulsa, Okl., Rice, Carpenter & Carraway, Washington, D.C., Belnap, Spencer, Hardy & Sweeney, Chicago, Ill., William J. Lippman, Galland, Kharasch, Calkins & Lippman, Wrape & Hernly, Washington, D. C., for plaintiffs.

Donald F. Turner, Asst. Atty. Gen., John H. D. Wigger, Atty., Dept. of Justice, Washington, D. C., Lawrence A. McSoud, U. S. Atty., Tulsa, Okl., Robert W. Ginnane and Raymond M. Zimmet, Interstate Commerce Commission, Washington, D. C., for defendants.

W. T. Brunson and Charles D. Dudley, Oklahoma City, Okl., Todd, Dillon & Sullivan, Washington, D. C., for intervenors.

FINDINGS OF FACT AND MEMORANDUM DECISION

Before MURRAH, Circuit Judge, and BOHANON and BARROW, District Judges.

MURRAH, Circuit Judge.

When this case was previously before this Court we remanded it to the Interstate Commerce Commission for findings whether the services offered in the contract motor carrier application were "transportation services" within the meaning of the Interstate Commerce Act, 49 U.S.C. § 303(a)(15). National Trailer Convoy, Inc. v. United States, 227 F.Supp. 730 (N.D.Okl., 1964). Upon remand the Commission, on consideration of the original record and without further evidence, determined that these services were "transportation services" within the meaning of the Act and again ordered issuance of the permit. From this ruling plaintiffs National Trailer Convoy, Inc., Morgan Drive-Away, Inc., and The Regular Common Carrier Conference of American Trucking Associations, Inc., filed petitions for reconsideration. These petitions were denied by the Commission. Plaintiffs seek review of this order and report.

The applicant, Griffin Mobile Home Transporting Co., is a new corporation formed to carry on interstate contract carriage of new, used, or damaged mobile homes. Its majority stockholder is holder of a current intrastate permit for the same contract carriage to and from points within Oklahoma. To qualify as a contract carrier by motor vehicle in interstate commerce the applicant must have "continuing contracts with one person or a limited number of persons * * * (b) for the furnishing of *transportation services* designed to meet the distinct need of each individual customer." [Emphasis added.] 49 U.S.C. § 303 (a)(15).

At the outset it is important to remember that judicial review of orders of the Interstate Commerce Commission is governed by the Administrative Procedure Act, 5 U.S.C. § 706, Ace Lines, Inc. v. United States, 197 F.Supp. 591 (S.D.Iowa, 1960), and is thus limited to inquiries into issues of Constitutional limitations, statutory authority, and sufficiency of the evidence to support the findings of fact of the agency. Winter Garden Company v. United States, 211 F.Supp. 280 (E.D.Tenn.N.D., 1962). This case will be reviewed in this context.

I

The plaintiffs' first contention is that the Commission abused its discretion in denying their petition for reconsideration. The basis for this petition, as argued to this Court, was that some of the shippers and dealers who appeared in support of the application were no longer in business. They seem to think this should be sufficient to reopen the case for further hearings. Case law clearly enunciates the principle that the granting or denying of a petition for reconsideration rests within the sound discretion of the agency and that their denial of such a petition will only be reversed for clear abuse of discretion. United States v. Pierce Auto Freight Lines, 327 U.S. 515, 66 S.Ct. 687, 90 L.Ed. 821 (1945); and Interstate Com-

merce Commission v. Jersey City, 322 U.S. 503, 64 S.Ct. 1129, 88 L.Ed. 1420 (1943). In the latter case Mr. Justice Jackson, speaking for the Court, observed "[I]t has been almost a rule of necessity that rehearings were not matters of right, but were pleas to discretion. And likewise it has been considered that the discretion to be invoked was that of the body making the order, and not that of a reviewing body."

Summary denial of such a petition is appropriate and "further findings and conclusions are unnecessary if it is clear that the Commission gave due consideration to the petition." Colorado-Arizona-California Express, Inc. v. United States, 224 F.Supp. 894 (D.Colo., 1963). In this case the Commission, in its order denying the petitions for reconsideration, stated that "no sufficient or proper cause appears for reopening the proceedings for reconsideration or to receive additional evidence." And the plaintiffs have failed to show wherein or in what way the grounds for their motion for reconsideration would require the Commission to reconsider its order. Absent such showing we cannot say that the Commission has abused its discretion.

II

In its application for a contract motor carrier permit, Griffin offered, among other things, the following services in addition to the pure "transportation" of the mobile homes:

(a) making such repairs to damaged trailers before towing them as would be necessary for safe towing on the highways,

(b) connecting the electrical and plumbing facilities when delivering to an owner's or dealer's lot, and

(c) setting up "expando trailers"[1].

[1] Expando trailers can be expanded to larger dimensions at destination points or folded up for towing on the highway.

The Commission found, and the evidence showed, that these three services were not available from the protesting common carriers. The Commission was of the opinion that "[T]he specialized services [supra] programmed by applicant are incidental to the movement of the house trailers from one place to another and are necessary to the complete effectuation of the matter in chief." 103 M.C.C. 501. It thus found these services to be transportation services within the meaning of the Act in accord with our remand. National Trailer Convoy, Inc. v. United States, supra.

Plaintiffs argue that the Commission did not have substantial evidence upon which to base this finding and the finding should, therefore, be set aside. But this argument overlooks the fact that these findings necessarily involve the interpretation of critical language in a statutory scheme by an agency charged with its administration. As such we are bound to accord it great weight. If the administrative construction is not wholly incompatible with the purpose of the Act we must accept it even though we would have reached a different result if the question had arisen in the first instance in judicial proceedings. Udall v. Tallman, 380 U.S. 1, at 16, 85 S.Ct. 792, 13 L.Ed.2d 616 (1965), cf. Garvey v. Freeman, 397 F.2d 600 (C.A.10, 1968). The Interstate Commerce Commission, not this Court, is charged with responsibility for the administration of the Act. As Judge Breitenstein has reminded us "[T]he delineation of what are transportation services is particularly within the competence and expertise of the Commission." National Trailer Convoy, Inc., supra.

As we have seen, one of the prime purposes of the contract carrier provisions of the Interstate Commerce Act, as gleaned from Section 203(a)(15), is to provide "transportation services designed to meet the distinct need of each individual customer." The statute does not require that these services be necessary but rather that they be designed

to meet individualized transportation needs. The terms "services" and "transportation" are defined to "include all vehicles * * * together with all facilities and property * * * used in the transportation of passengers or property * * * or *in the performance of any service in connection therewith.*" [Emphasis added.] 203(a)(19). The services offered by Griffin meet all of these tests in that as a whole, they were designed with the specific transportation needs of the supporting shippers and dealers in mind and thus qualify under the Act as "transportation services".

The plaintiffs raised only two other issues of possible merit. These were (a) that the Commission did not have sufficient evidence upon which to base its finding that the applicant was fit and able to perform the specialized services and (b) that these services were merely devices to reduce transportation rates. These two issues were first raised in this Court and come too late. Conley Electronics Corp. v. F. C. C., 394 F.2d 620 (C.A.10, 1968).

The decision of the Commission is affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
N. D. OKLAHOMA

Civ. A. No. 5760

NATIONAL TRAILER CONVOY, INC., *Plaintiffs,*
and
MORGAN DRIVE-AWAY, INC., and TRANSIT HOMES, INC.,
Intervening, *Plaintiffs,*

v.

UNITED STATES OF AMERICA, and INTERSTATE COMMERCE COMMISSION, *Defendants.*
and
GRIFFIN MOBILE HOME TRANSPORTING COMPANY, Intervening, *Defendant.*

March 20, 1964

Action to enjoin and set aside Interstate Commerce Commission's granting of application for permit authorizing interstate operation as a contract carrier. The District Court, Breitenstein, Circuit Judge, held that distinction must be made between shippers' transportation and non-transportation needs in determining whether contract carrier application should be granted, and, before Commission may give weight to shippers' distinct needs, it must determine that those needs pertain to a transportation service.

Order set aside, and case remanded for proceedings in accordance with opinion.

Bohanon, J., dissented.

Harold G. Hernly, Washington, D. C., Louis I. Dailey, Wrape & Hernly, Washington, D. C., and Memphis, Tenn. and J. C. Pinkerton Pinkerton & Pinkerton, Tulsa, Okl., for plaintiff.

James E. Lesh, Lesow & Lesh, Indianapolis, Ind., and J. C. Pinkerton, Tulsa, Okl., for intervening plaintiffs.

William H. Orrick, Jr., Asst. Atty. Gen., Washington, D. C., John M. Imel, U. S. Atty., Tulsa, Okl., Lionel Kestenbaum and Michael I. Miller, Dept. of Justice, Washington, D. C., for defendant United States of America.

Robert W. Ginnane, Gen. Counsel, and Thomas H. Ploss, Washington, D. C., for defendant I. C. C.

W. T. Brunson and Charles D. Dudley, Oklahoma City, Okl., for intervening defendant.

Before BREITENSTEIN, Circuit Judge, and BOHANON and BARROW, District Judges.

BREITENSTEIN, Circuit Judge.

This action is to enjoin and set aside a report and order of the Interstate Commerce Commission (Commission) entered in its Docket No. MC-124190, Griffin Mobile Home Transporting Co., Contract Carrier Application.[1] Over the objection of the plaintiff and the intervening plaintiffs, herein referred to collectively as protestants, the Commission granted to intervening defendant, herein referred to as applicant, a permit authorizing interstate operation as a contract carrier, by motor vehicle over irregular routes, of house trailers between points in Oklahoma and points in 33 other states. The issue is whether the Commission erred in giving consideration to certain services offered by the applicant, desired by the shippers, and not supplied by the protesting common carriers.

[1] The Commission report is published at 91 M.C.C. 801.

The facts are not in dispute. Applicant proposes to assign a vehicle with driver to the exclusive use of each of five supporting shippers. Each driver will normally serve a single shipper. The drivers will set up the trailers at the point of destination, "a service which might entail blocking, unblocking, assembling dinette sets or other furniture, connecting electrical and plumbing services, making minor repairs, and expanding 'expando' trailers."[2]

The protestants, all common carriers, are authorized to serve the area, have suitable equipment, and will perform all the offered services except making repairs, connecting electrical and plumbing facilities, and preparing expandos. The excepted services are said to be of a nontransportation nature and not proper for consideration by the Commission in determining the right to the permit.

The services in question are variously referred to in the Commission report as "accessorial," "ancillary," "additional," and "personalized." The name to be given them is not important. For purposes of identification we shall refer to them as special services.

The examiner said that there was merit in the argument that "certain of the accessorial services to be performed by applicant exceeds those normally connected with transportation." He expressed the opinion that a service to meet a shipper's distinct need "must involve services normal to the industry and incidental to transportation," and his recommedation was that the application be denied. The Commission accepted the examiner's findings of fact but rejected his recommendation.

In its report the Commission did not determine whether the special services were transportation or nontransporta-

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[2] 91 M.C.C. 802. An "expando" trailer can be expanded to larger dimensions at destination points or folded up for towing on the highway. A certain amount of training and specialization is needed to properly assemble and disassemble the "expando" trailers.

tion in character. Instead it said[3] that the primary issue "concerns the weight to be accorded to these various services." The protestants contend that the special services may be given no weight because they relate to nontransportation activities. The applicant and the defendants argue that the special services must be given weight because they relate to the distinct needs of shippers but they carefully refrain from arguing that such services pertain to transportation. In this posture of the case we must determine whether in acting upon an application for a contract-carrier permit, the Commission may give consideration to nontransportation services needed by shippers and offered by applicants.

After the decision in United States v. Contract Steel Carriers, Inc., 350 U.S. 409, 76 S.Ct. 461, 100 L.Ed. 482, holding that a contract carrier did not become a common carrier because it reached for new business within the limits of its license, the Commission, concerned over the relationship between these two types of carriers, proposed amendments to the Act.[4] The purpose was to revise the definition of contract carrier and to cover related matters. Two of the 1957 amendments are pertinent here.

Section 203(a)(15)[5] which defines contract carrier, was amended to read:

> "The term 'contract carrier by motor vehicle' means any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation (other than transportation referred to in paragraph (14) of this sub-

[3] 91 M.C.C. 803.

[4] See Interstate Commerce Commission v. J-T Transport Co., Inc., 368 U.S. 81, 85-86, 82 S.Ct. 204, 7 L.Ed.2d 147; and Senate Report No. 703, 85th Cong., 1st Session, U.S.Cong.News '57, pp. 1599, 1601, 1604.

[5] 49 U.S.C. § 303(a) (15).

> section and the exception therein), under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer."

Section 209(b)[6] covers the issuance of permits to contract carriers and was amended in 1957 by the addition of the following:

> "In determining whether issuance of a permit will be consistent with the public interest and the national transportation policy declared in this Act, the Commission shall consider the number of shippers to be served by the applicant, the nature of the service proposed, the effect which granting the permit would have upon the services of the protesting carriers and the effect which denying the permit would have upon the applicant and/or its shipper and the changing character of that shipper's requirements."

These 1957 amendments were reviewed by the Supreme Court in Interstate Commerce Commission v. J-T Transport Co., Inc., 368 U.S. 81, 82 S.Ct. 204, 7 L.Ed.2d 147. In that case J-T sought contract-carrier authorization for certain aircraft parts, and common carriers protested asserting their ability to meet the shipper's needs.[7] The

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[6] 49 U.S.C. § 309(b).

[7] The J-T decision involved two separate contract-carrier applications. One Reddish sought a contract-carrier permit on the ground that he could better serve customers who ordered less-than-truckload amounts. The Commission refused to follow the recommendation of the examiner and denied the permit for reasons similar to those in the J-T case. The Supreme Court similarly held that the Commission was in error.

examiner recommended the grant of the permit but the Commission denied it saying that the applicant had not shown the existing service of the other carrier to be inadequate. The Supreme Court held against the Commission saying that the standard is not whether existing services are "reasonably adequate" but whether a shipper has a "distinct need" for a different or more select or more specialized service, and that: "The protesting carriers must show they can fill that 'distinct need,' not that they can provide a 'reasonably adequate service.'"[8]

The J-T case is not decisive of the issue here presented because in J-T no question was raised as to the transportation nature of the services and the Court was not required to decide whether the Commission could consider nontransportation services.

To support its order now under consideration the Commission relies heavily on two provisions of the 1957 amendments. It points out that under the § 203(a)(15) definition a contract carrier is a person who engages in interstate transportation of persons or property for compensation under continuing contracts "for the furnishing of transportation services designed to meet the distinct need of each individual customer." Emphasis is placed on the term "distinct need" without differentiating between a distinct transportation need and a distinct need which is unrelated to transportation.

The language is plain and unambiguous. The contracts are to furnish transportation services. Such services, and only such services, are to meet the distinct needs of the customers. The reference to transportation services restricts and limits the language which follows.

The Commission also relies on the second criterion appearing in § 209(b), which says that in determining the

[8] 368 U.S. 91, 82 S.Ct. 210, 7 L.Ed.2d 147.

right of a contract carrier to a permit, the Commission shall consider "the nature of the service proposed." This is said to require consideration of the nature of the service as related to the distinct needs of the customer. If we are correct in our interpretation of § 203(a)(15) that the needs referred to are transportation needs, the error of the Commission is apparent.

The context of § 209(b) supports our view. Before setting forth the criteria which shall be considered, the statute says that a contract-carrier permit may be issued if, among other things, "the proposed operation * * * will be consistent with the public interest and the national transportation policy declared in this Act."[9] As we read the declaration of national transportation policy it is confined to transportation services. Further, the jurisdiction of the Commission under Part II of the Interstate Commerce Act

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[9] The national transportation policy, as declared in the Act, 49 U.S.C. preceding § 301 reads: "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act [chapters 1, 8, 12, 13 and 19 of this title], so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

(Motor Carrier Act) is stated thus in § 202(a) of the Act:[10]

> "The provisions of this chapter apply to the transportation of passengers or property by motor carriers engaged in interstate or foreign commerce and to the procurement of and the provisions of facilities for such transportation, and the regulation of such transportation, and of the procurement thereof, and the provision of facilities therefor, is vested in the Interstate Commerce Commission."

The parties all find comfort in Commission decisions antedating the 1957 amendments. The scales are about equally weighted. None of the selected Commission orders were subjected to court review. We deem it unnecessary to choose between the variety of decisions, all of which seem to have been made on an ad hoc basis. In the J-T decision, and in reference to the 1957 amendments here under consideration, the Supreme Court said:[11]

> "We cannot assume that Congress, in amending the statute, intended to adopt the administrative construction which prevailed prior to the amendment."

The references made to the legislative history are not helpful. We find nothing specifically pertaining to the issue before us. The Senate Report[12] emphasized the inadequacy of the existing law "to maintain proper distinctions between common and contract carriage," and concluded thus:

> "Your committee is of the opinion that the public interest in a sound transportation system, and par-

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[10] 49 U.S.C. § 302(a).

[11] 368 U.S. 89, 82 S.Ct. 209, 7 L.Ed.2d 147.

[12] U.S.Cong.News '57, pp. 1604, 1605.

ticularly in a stable and adequate system of common carriage, in the light of the objectives of the national transportation policy, require that the bill, as amended, be passed."

The continued emphasis of the Senate Report is on transportation with an intent to protect common carriers and retain the advantages of the contract carriers. We find nothing to indicate that Congress meant to give contract carriers the advantages which would ensue from furnishing nontransportation services.

The needs of shippers are varied and diversified. Some of these needs relate to transportation and some do not. The property transported has to be readied for use or sale. Activities pertaining to sale are beyond the scope of transportation. Activities pertaining to use may or may not be within the realm of transportation. The picking up and packing of household goods at the point of origin and their placement in position for use at destination have overtones of transportation. On the other hand the servicing of automobiles after delivery from the factory to a local dealer would seem to be divorced from transportation. Difficulty in drawing the line does not justify rejection of the statutory standard.

The Commission report here under attack does not distinguish between transportation and nontransportation needs of the shippers. We are of the opinion that the statute requires that the distinction be made and that before the Commision may give weight to the shippers' distinct needs it must first determine that those needs pertain to a transportation service. In the case under consideration it made no such determination. We decline to make the determination in advance of Commission action. The delineation of what are transportation services is particularly within the competence and expertise of the

Commission. The Commission should make the determination in the first instance and its decision then may be reviewed by the courts.

The order of the Commission is set aside and the case is remanded for further action by the Commission in accordance with the views herein expressed.

This opinion sufficiently states the findings of fact and conclusions of law of the court. Further findings of fact and conclusions of law are not necessary. The clerk will enter an appropriate judgment.

BOHANON, District Judge (dissenting).

I feel compelled to dissent from the views expressed in the majority opinion.

The facts as stated, and the applicable statutes, are as set forth in the majority opinion.

I feel that the specialized services offered to be rendered by the Petitioner to the supporting shippers are services so closely connected with, and particularly suited to meet the transportation needs of the supporting shippers that these services should be considered as an incident to "furnishing of transportation services * * * designed to meet the distinct need of each individual customer." It is my view that the transportation services and the attendant services offered by the applicant come within the purview and meaning of Section 203(a)(15) of the Interstate Commerce Act, and the majority view, in my opinion, is unduly restrictive.

I adopt as a part of this Opinion the Report of the Commission, in No. MC-124190, Interstate Commerce Commission-Griffin Mobile Home Transporting Company, contract carrier application, reported and published at 91 M.C.C. 801. I think the language used by Commissioner

Tucker at page 804 of the Report is particularly apt, where he said:

> "We would be closing our eyes to the realities of the situation if we were to refuse to consider the total requirement of a shipper supporting a contract carrier's application. To do so would be to deprive the shipper of the complete, personalized services which it needs, thus, in all likelihood forcing it to initiate or continue a proprietary trucking operation; a form of motor transportation which contract carriage ought to be free, completely and satisfactorily, to replace."

I would, therefore, affirm the Report and Decision of the Interstate Commerce Commission.

APPENDIX C

INTERSTATE COMMERCE COMMISSION

No. MC-124190

GRIFFIN MOBILE HOME TRANSPORTING CO.
CONTRACT CARRIER APPLICATION

Decided January 9, 1963

Operation by applicant, under contract with named shippers, as a contract carrier by motor vehicle, over irregular routes, of house trailers between points in Oklahoma, on the one hand, and, on the other, points in 33 States found to be consistent with the public interest and the national transportation policy. Issuance of a permit approved upon compliance by applicant with certain conditions.

W. T. Brunson and *Charles D. Dudley* for applicant.

James E. Lesh, John E. Lesow, and *Bill R. Privitt* for protestants.

REPORT OF THE COMMISSION

DIVISION 1, COMMISSIONERS MCPHERSON, BUSH, AND TUCKER

TUCKER, *Commissioner:*

Exceptions to the order recommended by the examiner were filed by applicant, and certain protestants replied. Our conclusions differ from those recommended.

By application filed February 5, 1962, Griffin Mobile Home Transporting Co., of Midwest City, Okla., seeks a permit authorizing operation, in interstate or foreign com-

merce, as a contract carrier by motor vehicle, over irregular routes, of house trailers between points in Oklahoma, on the one hand, and, on the other, points in Alabama, Arizona, Arkansas, California, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, Ohio, Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah, Washinton, Wisconsin, and Wyoming. Morgan Drive-Away Inc., Transit Homes, Inc., and National Trailer Convoy, Inc., opposite the application.

The examiner recommended that the application be denied. On exceptions, applicant contends that there is no requirement that a service offered by a contract carrier must be solely a "transportation" as distinguished from an "accessorial" service to warrant consideration in determining whether such service is better suited than that of opposing carriers to meet the distinct needs of the supporting shipper; that the examiner incorrectly relied upon the decision in *Petroleum Carrier Corp. Extension —Panama City, Fla.*, 82 M.C.C. 573, as that case involved an application for common carrier authority; that protestants cannot meet the reasonable transportation requirements of the shippers; and that the application should be granted. Morgan Drive-Away and Transit Homes jointly reply that the examiner properly concluded that the accessorial services which applicant offers to supply are not connected with transportation services; that protestants can provide any transportation service required; and that the application was correctly denied by the examiner.

We find the statement of facts in the examiner's report to be complete and accurate in all material respects, and we adopt it as our own. Portions of his report are set out as an appendix hereto.

Applicant which now owns five tractors, proposes to assign a vehicle with driver to the exclusive use of each

of the five supporting shippers, and it would obtain additional power equipment if needed. Its drivers would normally devote their services to a single shipper, thus becoming familiar with his particular needs and demands. They would set up the trailer on the dealer's lots or at the purchaser's homesite, a service which might entail blocking, unblocking, assembling dinette sets or other furniture, connecting electrical and plumbing services, making minor repairs, and expanding "expando" trailers. An "expando" trailer is one with a room that either slides out, folds out, or attaches to the side of a trailer coach, and it is towed with the same power equipment utilized for the transportation of other trailers. It is constructed so that it can be expanded to larger dimensions at destination points or folded up for towing on the highway. A certain amount of training and specialization is required in order to properly assemble and disassemble the "expando" trailers.

Protestants have the requisite authority to serve the proposed area; they possess equipment suitable for this transportation; and they would provide all the aforementioned services except repairing trailers, connecting electrical and plumbing facilities, and expanding the "expando" homes, all of which they consider to be accessorial services entirely foreign to transportation activities.

We agree with the examiner that the proposed operation would be that of a contract carrier within the purview of section 203(a)(15) of the Interstate Commerce Act, as applicant proposes to serve a limited number of shippers and assign motor vehicles and drivers to the exclusive use of each for a continuing period of time. In determining whether a grant of contract carrier authority would be consistent with the public interest and the national transportation policy, we are required by section 209(b) of the act to consider the number of shippers to be served by applicant, the nature of the proposed service, the effect

which granting the application would have upon the service of opposing carriers, the effect which denying the permit would have upon applicant and its supporting shipper; and the changing character of the shipper's requirements. These criteria have been considered at length in *Interstate Commerce Commission* v. *J-T Transport Co.*, 368 U.S. 81, and *Moyer Contract Carrier Application*, 88 M.C.C. 767.

The proposed operation, if the attendant accessorial services are considered, is a highly specialized one in that applicant proposes to provide not only over-the-road transportation services but certain additional services not offered by the opposing carriers or common carriers in general. The primary issue raised on exceptions and to be resolved in this proceeding concerns the weight to be accorded to these various services in determining whether a grant of authority herein would be consistent with the public interest and the national transportation policy.

Protestants, while asserting their abilty and willingness to meet the shippers' "normal" transportation needs, do not assert that they can provide the ancillary service here proposed. They contend that applicant's case depends almost entirely upon the offer of nontransportation, accessorial services which existing carriers have no obligation to furnish, and which are not matters to be considered in determining shipper's transportation requirements or whether protestants are able and willing to provide these transportation services. They cite and rely on *Petroleum Carrier Corp. Extension—Panama City, Fla.*, 82 M.C.C. 573. That case involved an application by a motor common carrier which proposed to allow the consignee to use its vehicles in spreading asphalt, a service protestant was not willing to supply. In denying the application, division 1 stated, 82 M.C.C. at pages 575-6:

> The use of a carrier's vehicles in the spreading operation constitutes a separate and distinct service from

that of transportation. Compare *Sweeton Common Carrier Application,* 47 M.C.C. 418. The auxiliary service proposed by applicant would, if allowed as the basis for the grant of authority, encourage those seeking to enter the transportation field to propose novel nontransportation services as a means of thwarting the effort of existing carriers to provide economical and efficient service within the scope of their authorities.

Applicant attempts to distinguish the *Petroleum Carrier* case on the ground that it involves the application of a common carrier, arguing that the distinction between transportation services and accessorial services made there should not be carried over to contract carrier applications. But this distinction has been drawn in at least one contract carrier application, *H. Messick, Inc., Extension—Carthage, Mo.,* 83 M.C.C. 1, in which division 1 refused to accept as relevant applicant's willingness to allow the supporting shipper to use its trailer for storage purposes, and denied the application. This decision relies upon the *Sweeton* and *Petroleum Carrier* cases, and does not contain any specific discussion of the question whether a contrary result might be justified in a situation where a contract carrier service is proposed. The *Messick* case is now pending before the entire Commission on petitions for reconsideration.

We have frequently had occasion to consider the nature of a contract carrier service as distinguished from a common carrier service. The service provided by a contract carrier has always been looked upon as being akin to private carriage, and as being one particularly closely adapted to the needs of the contracting shipper. Section 203(a)(15) refers to transportation services "designed to meet the needs of each individual customer," and the Supreme Court in the *J-T Transport* case stressed this aspect of contract carriage. On the other hand, we have

repeatedly pointed out that a common carrier is in no way precluded from providing highly specialized services, so long as it holds out the same services, through an appropriate tariff publication, to the public at large. The common carrier, however, is not obligated to provide such services, and we think the *Petroleum Carrier* case and others of similar import (e.g., *Feaster Trucking Service Inc., Extension—Crude Oil,* 81 M.C.C. 114, and *E. Brooke Matlack Inc., Extension—Flour in Bulk,* 89 M.C.C. 76) correctly refuse to consider this point when evaluating the willingness and ability of a common carrier to render a reasonably satisfactory transportation service. In a contract carrier application, however, this is not the end of the matter. The Supreme Court has pointed out in the *J-T Transport* case, 368 U.S. at page 92, that even though opposing common carriers are able to provide reasonably adequate service, a grant of a permit may be consistent with the public interest and the national transportation policy because the "distinct need" of the supporting shipper might not be as well served by protestants as by applicant. We would be closing our eyes to the realities of the situation if we were to refuse to consider the total requirement of a shipper supporting a contract carrier's application. To do so would be to deprive the shipper of the complete, personalized service which it needs, thus, in all likelihood, forcing it to initiate or to continue a proprietary trucking operation: a form of motor transportation which contract carriage ought to be free, completely and satisfactorily, to replace.

We believe, too, that the Commission's traditional approach to contract carriage supports our conclusion here. In *Craig Contract Carrier Application,* 31 M.C.C. 705, the entire Commission, in a particularly well reasoned report, dealt with the question whether an applicant for "grandfather" authority under the Transportation Act of 1935 was a common or a contract carrier. It was pointed out

there that the fundamental difference between these two forms of motor transportation is the presence or absence of a holding out to serve the general public. The Commission then went on to say, 31 M.C.C. at pages 711-12:

> The formulation of a practicable and satisfactory test requires that the difference in holding out between a common-carrier and a contract-carrier service be reinforced by emphasis on individuality and specialization of the service in the case of a contract carrier as contrasted with the service to the general public rendered by a common carrier.
>
> The specialization which we have in mind may consist in the rendition of other than the usual physical services for the purpose of supplying the peculiar needs of a particular shipper, such, for example, as the furnishing of equipment especially designed to carry a particular type of commodity, the training of employees in the proper handling of particular commodities, *or the supplying of related nontransportation services such as the assembling, placing, or servicing of machinery.* [Emphasis added.]

Having concluded, as we have here, that weight should be given to applicant's proposal to provide certain ancillary services, only brief consideration of the evidence presented in light of the section 209(b) criteria is necessary. We believe that applicant has demonstrated that it is better equipped to meet the distinct needs of the supporting shippers than are the protestants. As the latter properly do not undertake the connecting of electrical and plumbing facilities, the repairing of trailers, and the expansion of the expando trailers, which shippers need in order to have a complete service, and which applicant proposes, it follows that they cannot meet the demonstrated distinct needs of the shippers. Therefore, a denial of the application would deprive shippers of a motor carrier service particu-

larly suited to meet their transportation needs and would impel them to continue the utilization of private carriage, a service they desire to decrease or discontinue. The extent of protestants' participation in this traffic has been negligible inasmuch as most of it has been transported by private carriage in the past. In any event, any adverse effect which a grant of authority might have upon protestants' service, we believe, would be outweighed by the advantages to the supporting shippers of having service of the type proposed available. On the other hand, it must be admitted that denial of the application would have no apparent adverse effect on applicant, which does not hold authority to serve the shippers in interstate movements beyond Oklahoma. The changing character of the shippers' requirements does not appear to be a significant factor here, and has not been advanced as such. Having weighed the criteria of section 209(b), we conclude that the application should be granted.

We find that operation by applicant, in interstate or foreign commerce, as a contract carrier by motor vehicle, over irregular routes of house trailers between points in Oklahoma, on the one hand, and, on the other, points in Alabama, Arizona, Arkansas, California, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, Ohio, Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah, Washington, Wisconsin, and Wyoming, limited to a transportation service to be performed under continuing contracts with B & B Mobile Homes, Baker Mobile Home Sales, Inc., George Lane Mobile Homes, Wheeler Trailer Exchange & Park, all of Oklahoma City, Okla., and the Founders Investment Corporation, of Kansas City, Mo., will be consistent with the public interest and the national transportation policy; that applicant is fit, willing, and able properly to perform such service, and

to conform to the requirements of the Interstate Commerce Act and our rules and regulations thereunder; and that a permit authorizing such operations should be granted.

Upon compliance by applicant with the requirements of sections 215, 218, and 221(c) of the act, with our rules and regulations thereunder, and with the requirements established in *Contracts of Contract Carriers*, 1 M.C.C. 628, within the time specified in the order entered concurrently herein an appropriate permit will be issued.

An appropriate order will be entered.

COMMISSIONER MCPHERSON concurs in the result.

APPENDIX

Statement of facts contained in the hearing examiner's report

Applicant presently holds no authority to conduct operations in intrastate or interstate commerce. The controlling stockholder of applicant (Jack L. Griffin, hereinafter called Griffin) holds intrastate authority (permit No. 11493) which authorizes him to tow house trailers to and from all points in Oklahoma. This common carrier intrastate authority has been registered with the Interstate Commerce Commission (No. MC-120929), and operations are being conducted under the second proviso of section 206(a) of the act. Griffin owns and operates five pieces of power equipment (ranging in overall lengths of from 11 feet to 15 feet), all of which are designed and used for the pulling or towing of house trailers. In addition, this individual owns some house trailers which are rented to individuals. He also owns and operates an automobile repair shop. Sometime in 1958, a corporation controlled by Griffin sought common carrier authority to transport house and utilities trailers between points in Okla-

homa, on the one hand, and, on the other, points in the United States. This application (No. MC-117756) was denied by the Commission division 1, in its report decided March 29, 1960.

Griffin's intrastate rights were registered with the Commission approximately 1 year ago, and he is actively engaged in the movement of new and used mobile homes. It is estimated that from 20 to 35 trailers are handled monthly in intrastate commerce, and since registration of the rights he has participated in the movement of from 12 to 18 trailers destined to points outside Oklahoma. He provides in addition to movement of the trailer homes, certain accessorial services, such as preparing the trailers for movement and setting up trailers at the point of delivery either for the individual purchaser or for display purposes on dealers' lots. The accessorial services entail blocking, unblocking, setting up the furniture and possibly other fixtures in the trailers, hooking up plumbing and electrical utilities, and expanding or extending the expando type trailers. He handled a total of three of the expandos during April 1962. This individual alleges full compliance with the Commission's safety rules and regulations. He was, however, fined $1,000 by the U.S. District Court for the Western District of Oklahoma upon a plea of guilty to an information charging interstate operations beyond the scope of the registered rights in violation of part II of the act.

The applicant corporation is inactive at the present time, but if the instant application is granted the motor vehicle equipment and the intrastate rights of Griffin will be transferred to it. Applicant proposes to serve a limited number of shippers, and will provide under contract to such shippers equipment and drivers sufficient to meet their needs and for their exclusive use. It proposes to offer, in addition to transportation, any additional services which may be needed or required by shippers.

As of May 22, 1962, Griffin's total assets were $133,596.62, whereas total liabilities were only $26,833.82, thus a net worth of $106,762.80. The applicant corporation at the time of hearing had no net worth. The pro forma balance sheet submitted, however, shows that in the event operations are instituted this corporation would have total assets of $12,100, including cash of $2,000, operating equipment valued at $8,600, and Oklahoma intrastate rights valued at $1,500.

The application is supported by four dealers of new, used, or damaged house trailers, and a maunfacturer of mobile homes: The latter, the Founders Investment Corporation of Kansas City, Mo., has a subsidiary company (Chickasha Mobile Homes, Inc.), which manufactures mobile homes at Chickasha and Ponca City, Okla., and Vidalia, Ga. The facilities at Chickasha manufacture about 35 mobile homes a week, ranging in length from 35 feet to 60 feet, with widths of from 8 feet to 10 feet. About 50 percent of all trailers manufactured are 60 feet in length. Distribution of the mobile homes is made through dealers located in an area extending as far west as Nevada, thence north to the Canadian line. Mobile homes are primarily delivered to dealers in equipment owned and operated by the manufacturer, or in vehicles owned and operated by the various dealers. The shipper owns 30 units of equipment and transports about 60 percent of its Chickasha and Ponca City volume. About 10 percent or two or three trailers a week are handled out of Ponca City by National. This carrier is also used occasionally for shipments moving from the Chickasha plant.

When deliveries are made in company-owned equipment, shipper's drivers are responsible for spotting and blocking the mobile homes on dealer lots, setting up dinette sets and otherwise placing the home in condition for display, making minor repairs, and at times collecting c.o.d. charges. In addition their duties are to set up and expand the

expando type trailers. The latter represents about 16 percent of the total production. The shipper will sign a contract with the applicant, and expects the carrier to furnish equipment for its exclusive use. It is further expected that applicant's drivers will be called upon to perform the same accessorial services as are now provided by the shipper's own employees. The shipper has some repossessed trailers returned to the plant for reconditioning.

The shipper has found that existing motor carriers do not perform a personalized service in the way of setting up and expanding homes, however, National at times will set up those coaches which are not expandable. In addition, other objections to this carrier's service are that the same driver or drivers are not always made available, and that it is not equipped to handle 60-foot trailers in certain States. It knows that Morgan can serve Chickasha, but the service of that carrier has not been used. If the instant application is granted, the shipper will continue to utilize its own equipment, but allegedly private carriage operations will be curtailed. It has no intention of discontinuing the services of common carriers. Although the shipper and applicant have not agreed upon the rates to be charged, the shipper believes the cost will be comparable to that of common carriers.

B & B Mobile Homes of Oklahoma City is a retail dealer in new and used mobile homes. In addition to Oklahoma City, it has places of business at Lawton, Okla., and Columbus and Biloxi, Miss. It sells or deals in new house trailers manufactured by various concerns, one of which (Vaught Industries) has plants located at Marlette, Mich., Bourbon, Ind., and Clarion, Pa. In addition, it has obtained new trailers from a depot located at Atlanta, Ga., and new or used trailers from Union City, Mich., Traveres, Fla., Texarkana, Tex., Loveland, Colo., and Hutchinson, Kans. The shipper opened the Lawton facility in May 1962, and the one in Oklahoma City about February 1962.

Since the latter lot was opened, about 15 trailers have been moved there. The shipper expects to handle about 100 trailers a year at each of the 2 Oklahoma lots, and of this amount about 25 percent will move in interstate commerce. The services of all three protestants have been used to some degree on both inbound and outbound shipments, principally in connection with traffic moving to and from the Mississippi lots. Such carriers have handled no traffic to or from the Oklahoma City lot, but two coaches were transported by Morgan to Lawton. The shipper also has two units of equipment stationed at Columbus which along with factory transport are used to transport traffic to and from all of the lots. In connection with movements from the factory in equipment other than that owned and operated by the dealer, the manufacturer generally decides whether factory transport or regulated motor carriers will be used. Shipments of both new and used trailers may be made to any point in the proposed area. For example recently one trailer was transported to Las Vegas, Nev., and one to Mather, Calif.

The shipper at times has found the services of protestants satisfactory, however such carriers do not expand the expando type trailers, nor do they as a general rule provide the shipper with the particular driver requested. The shipper wants the services of a carrier that will provide any and all services necessary to completely set up the trailer at the point of delivery, and expects such carrier to provide equipment and drivers for its exclusive use. The services of Griffin have been used for shipments moving in intrastate commerce, and such service has been satisfactory. The shipper is interested in service principally on shipments moving to and from Oklahoma City and Lawton, and it is willing to sign a contract with applicant provided there can be a meeting of the minds on the minimum amount of traffic to be handled and the rates to be charged. The shipper expressed a desire to discontinue its private carriage.

Wheeler Trailer Exchange & Park, of Oklahoma City, deals in new, used, and salvaged house trailers. In addition, it handles coaches belonging to others on a consignment basis, and operates a 50-place trailer park. It is a franchised dealer for Melody Home of Forth Worth, and handles other new trailers which may be acquired at any point throughout the country. For example, trailers have been purchased at Amarillo, Tex., Albuquerque and Grants, N. Mex., Aztec, Ariz., and at undisclosed points in Texas, Kansas, and Florida. The yearly volume of trailers moving to Oklahoma City is estimated to be 100, and outbound traffic would be about the same. This total would include salvaged or damaged trailers which have been repaired at Oklahoma City. Its transportation services are performed by two units of company equipment, and at times by Morgan, National, and Transit. In addition, Griffin's services have been used for movements within the State of Oklahoma. The shipper wants to discontinue private carriage, and it desires the services of a motor carrier able and willing to set up the mobile homes, procure delivery receipts, and to do any other chore necessary to make the coach liveable. In other words it wants a service comparable to that provided by its own employees, and it is willing to enter into a contract with applicant provided an agreement can be reached on the minimum volume of traffic to be handled. Protestants have not been requested to perform the accessorial services which applicant would be expected to perform, but the shipper is of the opinion that common carriers are unable to provide the type of service needed.

George Lane Mobile Homes deals primarily in used and damaged mobile homes at Oklahoma City. Damaged coaches are generally bought through insurance bids, and have in the past been purchased at Columbus, Toledo, and Cincinnati, Ohio, and at undisclosed points in Missouri, Arkansas, Louisiana, Texas, Kansas, Colorado, and New Mexico. The used homes are purchased from dealers and

others at various points in this same general area. This shipper deals in from 120 to 140 trailers a year, and such traffic is handled partly with the one piece of company-owned equipment. In addition, Griffin has handled some intrastate traffic and also some movements from Oklahoma City to the State line where the traffic was interlined with an undisclosed carrier. Griffin has moved damaged expando trailers, and in addition he has handled the financial arrangements for some trailers on behalf of the shipper. Some of the damaged trailers require repairs before they can be moved to the Oklahoma City lot for reconditioning, and upon occasion the shipper has had to send its own employees to make these repairs. The services of a motor carrier able and willing to make repairs where needed and to provide other accessorial services is desired by the shipper. The latter would enter into a contract with applicant, and it proposes to curtail and if possible discontinue the use of private carriage.

Baker Mobile Homes Sales, Inc., is engaged in the business of buying, selling, and servicing new and used mobile homes, some of which are of the expando type. In addition, it sells mobile homes for others on a consignment basis. It has sales lots at Oklahoma City and Wichita Falls and Fort Worth, Tex. This shipper deals in a number of brands of new trailers, and estimates that it handles a total of from 200 to 250 new trailers a year. Of this amount from one-half to two-thirds involve the Oklahoma City lot, and about 40 percent of the sales are made to customers located outside of Oklahoma. Used trailers handled in the course of a year total about 300, of which one-third or more are shipped to or from the Oklahoma City facility. Collectively, house trailers have been purchased at various points in Arkansas, Texas, New Mexico, Colorado, Kansas, Missouri, Mississippi, Nebraska, Oklahoma, and California. The shipper owns four transportation units which are used for the movement of mobile homes to and from its respective lots. Such equipment is

used principally for outbound shipments. The shipper's drivers, upon delivery, block the trailers, assemble dinette and possibly other furniture, expand the expando type homes, and at times hook up plumbing and electrical facilities. Also, where needed, repairs are made to used trailers before movement to the various lots. In addition to private carriage operations, the shipper has used the services of Morgan and National on the movement of both new and used trailers to Oklahoma City. Their services have not been used on outbound shipments. The actual transportation services rendered by National and Morgan are considered satisfactory, but such carriers do not always furnish the same driver nor do they perform each and every service provided by the shipper's own drivers or employees in connection with the private carrier operations. For example on a movement of an expando trailer by one of the protestants to a point in Kansas, the shipper had to send a company employee to set the trailer up. The shipper expects applicant to perform all the accessorial services now provided by its employees, and will enter into a contract with the carrier provided there can be an agreement with respect to the rates to be charged.

Three transporters of house trailers presented evidence in opposition to the application. Transit holds common carrier authority to transport trailers, except freight-carrying vehicles, in secondary movements, in towaway service, over irregular routes, between points in the United States, except those in Indiana. It maintains terminals or booking agents, insofar as here important, at Tulsa, Altus, Lawton, and Oklahoma City, Okla. and operates 325 pieces of leased equipment. It has three pieces of equipment stationed at Tulsa but maintains no equipment at the three other Oklahoma terminals. This carrier also handles wrecked, disabled, and damaged trailers, and provides shippers with the same drivers where requested, and also

provides the extra services shown to be needed by the supporting shippers, except hooking up plumbing or electrical facilities, and expanding the expando type homes. It considers the latter services to be beyond the normal duties of a carrier engaged in the transportation business. Protestant is willing to station equipment at Oklahoma City if the volume of traffic warrants, and it desires to participate in the movement of house trailers in secondary movements.

Morgan is a common carrier with irregular-route authority, insofar as here material, to transport (1) trailers designed to be drawn by passenger automobiles, in initial movements, in truckaway service, (*a*) from Lawton and Chickasha, Okla., to points in the United States; except Mount Clemens, Detroit, and Flint, Mich., and (*b*) from the site of the plant of El Reno Trailers, Inc., located approximately 8 miles south of El Reno, Okla., to points in the United States, except Mount Clemens, Detroit, and Flint, Mich., and (2) house, cabin, and bungalow trailers, restricted to secondary movements, in truckaway and towaway service between points in the United States. It operates between 800 and 900 pieces of equipment, and, insofar as here important, has terminals in Oklahoma at Altus, Lawton, and Oklahoma City. Six pieces of equipment are stationed at Oklahoma City, two units at Lawton, and one at Altus. Protestant transports expando type trailers, but does not expand them. It frequently provides shippers with preferred drivers, and provides the usual accessorial services such as blocking, unblocking, and assembling furniture. This protestant has served the Chickasha manufacturer, and desires to serve all of the supporting shippers.

National holds common carrier authority, insofar as here material, to transport (1) house trailers, restricted to secondary movements, in truckaway service, between points in the United States, and (2) trailers designed to be drawn

by passenger automobiles, in initial movements in truck-away service, (*a*) from Lawton and Chickasha to points in the United States, except Mount Clemens, Detroit, and Flint, Mich., and (*b*) from Tulsa (except from the plant site of the Sparton Aircraft Company at Tulsa), Broken Arrow, and Ponca City, Okla., to points in the United States (except points in Alaska and Hawaii). It operates around 652 leased trucks, and has terminals in Oklahoma at Tulsa, Oklahoma City, Lawton, and Altus. Protestant has stationed 18, 6, 3, and 2 trucks, respectively, at the above terminal points. It transports expando and other types of mobile homes, and has served the Chickasha shipper, allegedly without complaint. It provides certain accessorial services, such as setting up house trailers on dealers' lots, and is ready and able to serve all of the supporting shippers. Protestant believes that a grant of additional authority in this area will affect its overall business.

APPENDIX D

Served January 23, 1967

INTERSTATE COMMERCE COMMISSION

No. MC-124190

GRIFFIN MOBILE HOME TRANSPORTING CO. CONTRACT CARRIER APPLICATION

Decided December 30, 1966

Upon reconsideration, following judicial remand in *National Trailer Convoy, Inc.* v. *United States*, 227 F. Supp. 730, (N. D. Okla. 1964), findings in prior report, 91 M.C.C. 801, affirmed. Operation by applicant as a contract carrier by motor vehicle, over irregular routes, of house trailers between points in Oklahoma, on the one hand, and, on the other, points in 33 other States, found to be consistent with the public interest and the national transportation policy. Issuance of a permit approved upon compliance by applicant with certain conditions, and application in all other respects denied.

W. T. Brunson and *Charles D. Dudley* for applicant.

James E. Lesh, John E. Lesow, and *Bill R. Privitt* for protestants.

R. Edwin Brady, Albert B. Rosenbaum, John C. Bradley, and *Roland Rice* for intervenor in opposition to the application.

Clarence D. Todd, Eugene M. Malkin, and *Charles F. Riddle* for intervenor in support of the application.

REPORT OF THE COMMISSION ON RECONSIDERATION

WALRATH, *Commissioner:*

In the prior report herein, 91 M.C.C. 801, decided January 9, 1963, division 1 granted applicant, Griffin Mobile

Home Transporting Co. (Griffin), contract carrier authority to transport house trailers between points in Oklahoma, on the one hand, and, on the other, points in 33 other States, limited to a transportation service to be performed under continuing contracts with named shippers.

Upon consideration of petitions for reconsideration filed by protestants, and replies thereto filed by applicant and by the Contract Carrier Conference of American Trucking Associations, Inc., whose intervention had been previously authorized, we, by order of July 25, 1963, denied the petitions and allowed the findings of the division to stand. This order was set aside on March 20, 1964, by the United States District Court for the Northern District of Oklahoma in *National Trailer Convoy, Inc.* v. *United States,* 227 F. Supp. 730, and the case was remanded to us for further action in accordance with the views expressed in the court's opinion. Pursuant to that direction, we have reopened the proceeding for reconsideration on the present record. Since the matter presented involves a basic distinction between transportation and nontransportation services affecting applications for motor carrier operating authority generally, the Regular Common Carrier Conference of the American Trucking Association, Inc., has been allowed to intervene and to file a brief on reconsideration setting forth its views in opposition to the application. The Contract Carrier Conference has also been permitted to reply.

The District Court's Mandate

The grant of authority to applicant in the prior report was based, in substantial part, upon evidence of the shippers' needs for certain services in addition to the bare line-haul movement. Division 1 had concluded that, absent the rendition by applicant of such extra services, the supporting shippers would be deprived of the complete service they required. In remanding the proceeding for further consideration, the court noted that in reversing the examiner's recommended denial, the division had adopted the state-

ment of fact of the examiner that certain accessorial services to be performed by applicant exceed those normally connected with transportation, and that a service to meet a shipper's distinct need "must involve services normal to the industry and incidental to transportation." The court held that the Commission in weighing the supporting shippers' distinct needs must first ascertain whether such needs pertain to the basic transportation service. It observed that the division did not specifically determine whether the special services were transportation in character, but rather concerned itself with the weight to be accorded such services. The court concluded:

> The Commission report here under attack does not distinguish between transportation and nontransportation needs of the shippers. We are of the opinion that the statute requires that the distinction be made and that before the Commission may give weight to the shippers' distinct needs it must first determine that those needs pertain to a transportation service. In the case under consideration it made no such determination. We decline to make the determination in advance of Commission action. The delineation of what are transportation services is particularly within the competence and expertise of the Commission. The Commission should make the determination in the first instance and its decision may then be reviewed by the courts.

Herein, we will make that initial decision called for by the court in its opinion. Whether the extra services proposed by applicant and required by the shippers supporting the application do, in fact, constitute transportation services is plainly a prime issue in disposing of this application.

Involved is a basic distinction between transportation and nontransportation services affecting applications for motor carrier operating authority generally. As a consequence, we deem it useful to examine the legislative and

interpretative background of applicable sections of the act. The evidence, the prior report, and the pleadings of the parties and interveners have been considered and will be discussed later.

Legislative and Interpretative Background

The word "transportation" in a general sense imports the removal of property or persons from one place to another. As employed in part II of the act, it is defined in section 203(a)(19) as including—

> all vehicles operated by, for, or in the interest of any motor carrier irrespective of ownership or of contract, express or implied, together with all facilities and property operated or controlled by any such carrier or carriers and used in the transportation of passengers or property in interstate or foreign commerce or in the performance of any service in connection therewith.[1]

This definition applies equally to common and contract carriers by motor vehicle and it may not be applied differently to either class of carriage. What is "transportation," therefore, must mean the same for both common and contract carriers alike. See *H. Messick, Inc., Extension—Explosives*, 102 M.C.C. 492, 503. The contrary arguments

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[1] The act as originally drafted included in the definition of "transportation" the words "carriage, receipt, delivery, storage, refrigeration or icing, transfer, and handling." These words were eliminated by the Senate Interstate Commerce Committee which considered the bill prior to its passage. In explaining to the Senate the reason for this and other changes made in the definition, the chairman of the committee said:

> The definition of "services" and "transportation" is intended to cover all facilities owned and used by motor carriers. The changes made by the committee remove any possibility of a construction which would include the facilities of the shippers or others which the motor carriers may use for pickup or delivery of shipments.

of the Contract Carrier Conference are lacking in statutory foundation and are here rejected.

But the skeletal outline of the section 203(a)(19) definition must be accorded practical application. And, as so clearly stated here by the court, whether any particular service is or is not a "transportation service" under the act is a matter for initial determination by this Commission. The Supreme Court, in *United States* v. *U. S. Smelting Co.*, 339 U.S. 186 (1950), enunciated this proposition in the following vein (at page 193):

> That the Commission is authorized to establish the point where line-haul service begins and ends is not to be doubted. The question, in reviewing the Commission's determination of the convenient points at which line-haul or carrier transportation service begins and ends, is whether such determination is supported by substantial evidence, [footnote omitted] as this court said in *United States* v. *Wabash R. Co.*, 321 U.S. 403, 408:
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> > "In sustaining the Commission's findings in these proceedings, as in related cases, this court has held that the point in time and space at which the carrier's transportation service ends in a question of fact to be determined by the Commission and not the courts, and that its findings on that question will not be disturbed if supported by evidence."

In the great majority of cases, of course, no problem arises respecting the nature of a proposed service. Thus, applicant here unquestionably is offering to provide "transportation" at least insofar as the proposed operation contemplates the movement of house trailers from one place to another. However, where an applicant plans to use, in addition to motor vehicles for the over-the-road transportation, certain other facilities, equipment, or personnel controlled by it to provide some extra or added service

which it views as being related to the highway movement, a question arises under the present court's determination as to the limits of the *actual* transportation that would be performed. These extra services have been variously referred to as auxiliary, accessorial, ancillary, and special; but it is the determination as to whether they properly may be regarded as a part of the transportation service under consideration that is important, not the name by which they are called.

By far the most prevalent verbalization of a test as to what is or is not a "transportation service" under part I of the act centers around the "necessarily incidental" standard formulated in *Guaranty Claim of Central Elevator & Warehouse Co.*, 72 I.C.C. 169 (1922). There, it was said at pages 175-6:

> The receipt and delivery of property are, of course, a part of a carrier's transportation service. Elevation and transfer in transit have frequently been found by us and by the courts to constitute necessary steps in the transportation of various kinds of property. *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U.S. 42; *Union Pacific Railroad Company* v. *Updike Grain Company*, 222 U.S. 215.
>
> Storage of property transported is a transportation service only to the extent that storage is necessarily incidental to transporting such property, and the term has been used in section 1 in that limited sense. As was said by the court in *State* v. *Southern Pacific Company, supra:*
>
> > We think that the storage of goods by a railroad in its warehouses, as a matter incidental to its business as such, contemplates and looks to a rotation of storage as immediate and prompt as the railroad corporation can make it. * * * To be incidental business, the storage must be preliminary either to immediate transportation or immediate removal.

These and other precedents were later assembled in *Propriety of Operating Practices—New York Warehousing,* 198 I.C.C. 134, 216 I.C.C. 291, and 270 I.C.C. 102, affirmed by the Supreme Court in *B. & O. R. Co.* v. *United States,* 305 U.S. 507 (1939). In this case, which most regard as the controlling decision as to the meaning of the word "transportation" under part I of the act, those extra services embodied within the term "transportation" were said to be "involuntary" (at 216 I.C.C. 348):

> Involuntary storage is a part of the transportation service defined in section 1 of the Interstate Commerce Act. Other storage, voluntary or commercial in nature, is not included within the term "transportation" as there used. * * * There are many services and acts, including storage and handling of goods, which are necessary in or incidental to the conveyance of goods by rail from one locality to another, which are not a part of transportation as defined in section 1. A clear distinction should be made between voluntary or commercial storage ordinarily performed by a warehouse, and the involuntary storage which carriers subject to the act are obligated to perform. Our duty, under the circumstances here involved, requires us to determine when transportation as defined in the act begins and ends, and to determine whether acts or services incident to the conveyance of goods from one point to another are or are not a part of transportation which common carriers subject to the Interstate Commerce Act are obligated to perform. Such matters are questions of fact.

The rationale of these cases, of course, was developed in the context of regulating rail carriers subject to part I of the act. Nevertheless, the same principles have been accorded important weight in considering the proposed operations of carriers seeking to become subject to part II of the act. See *Practices of Motor Common Carriers of*

Household Goods, 17 M.C.C. 467, 492-495 (1939). While we, of course, realize that this common carrier precedent enunciated under part I of the act cannot be adopted wholesale and unqualifiedly applied to contract carrier applications under part II, the fundamental principles there approved have received judicial sanction, are well known in transportation circles, and may readily be applied as an aid in resolving difficult questions in this area whether they arise under part I or part II of the act.

In commenting upon the problem of distinguishing between transportation and nontransportation services, the district court in the instant proceeding observed:

> The needs of the shippers are varied and diversified. Some of these needs relate to transportation and some do not. *The property transported has to be readied for use or sale. Activities pertaining to sale are beyond the scope of transportation. Activities pertaining to use may or may not be within the realm of transportation.* The picking up and packing of household goods at the point of origin and their placement in position for use at destination have overtones of transportation. On the other hand the servicing of automobiles after delivery from the factory to a local dealer would seem to be divorced from transportation. Difficulty in drawing the line does not justify rejection of the statutory standard. [Emphasis added.]

Whether a particular service is or is not a "transportation service" is, as has been said, dependent upon the facts. In this connection, the specialized nature of the delivery service proposed to be rendered by an applicant has been accorded varying degrees of significance in deciding whether to grant or deny motor carrier operating authority. Examples of such specialized deliveries include "key-stop" delivery services-deliveries by drivers supplied with keys to open the consignee's place of business and to effect de-

liveries in the absence of the consignee, *Green Bros., Inc., Contract Carrier Application,* 18 M.C.C. 94 (1939); *Schirmer Transp. Co., Inc., Extension—Superior, Wis.,* 76 M.C.C. 293 (1958); and *Briggs Contract Carrier Application,* 92 M.C.C. 707 (1963). Other instances of specialized delivery services considered in connection with past operating authority applications include pipeline stringing, *Joe D. Hughes, Inc., Contract Carrier Application,* 23 M.C.C. 563 (1940), and *Cox Common Carrier Application,* 26 M.C.C. 502; the inside delivery of newsprint rolls directly to the presses, *Blinn, Morrill Co. Contract Carrier Application,* 28 M.C.C. 299 (1941), findings modified on reconsideration, 41 M.C.C. 817 (1943); the installation of household furniture and equipment, of electrical appliances, and of other machinery, *Purdy Contract Carrier Application,* 11 M.C.C. 240 (1939); *Welch Contract Carrier Application,* 13 M.C.C. 569 (1939); *Robinson Common Carrier Application,* 16 M.C.C. 781 (1939); *Practices of Motor Common Carriers of Household Goods,* 17 M.C.C. 467 (1939); the *Green Bros.* case, *supra; Stepanek Contract Carrier Application,* 21 M.C.C. 612 (1940); and *Wieger Contract Carrier Application,* 79 M.C.C. 777 (1959); the inside delivery of department store merchandise directly to the floor and department required, *A. B. C. Exp. Co. Extension—Moorestown, N. J.,* 94 M.C.C. 386 (1964); and the rendition by the carrier of spreader or similar services, *Sweeton Common Carrier Application,* 47 M.C.C. 418 (1947); *Clark Tank Lines Co. Extension—Billings, Mont.,* 82 M.C.C. 301 (1960); *Petroleum Carrier Corp. Extension—Panama City, Fla.,* 82 M.C.C. 573 (1960); and *Star Carriers, Inc., Extension—Agricultural Limestone,* 88 M.C.C. 282 (1961). The provision by the carrier of storage and warehousing services also has been accorded varying importance in passing upon motor carrier operating authority applications. *Buss Extension—Hewitt, N. J.,* 67 M.C.C. 635 (1956); *Feaster Trucking Service, Inc., Extension—Crude Oil,* 81 M.C.C. 114 (1959); *Kenosha Auto Transport Corp. Extension—Foreign Cars,* 83 M.C.C. 527 (1960); *E. Brooke Matlack,*

Inc., Extension—Flour in Bulk, 89 M.C.C. 76 (1962); *Delaware Exp. Co. Extension—Liquid Fertilizers,* 92 M.C.C. 718 (1963), findings modified 98 M.C.C. 154 (1965); and the *Messick* case, *supra.* And finally, terminal preparation, maintenance, and conditioning services were explicitly not considered in denying an application for common carrier authority to transport automobiles in the *Kenosha Auto Transport* case, *supra.*

In determining, in these and other cases, whether a proposed special service may be considered in deciding the merits of applications for motor carrier operating authority, i.e., whether such services are, in fact, incidental to the movement of propety from one place to another so as properly to be classified as "transportation services," we have found the consideration of certain facts helpful. Some of the more important of these are whether the special service is performed while the goods are in the custody and control of the carrier or whether delivery has already been affected to the consignee; whether the service is comparatively simple or complex and the degree of training required for its effective performance; whether delivery is made to a dealer or seller of the goods, rather than to a user thereof; whether the service is one which the carrier is or should be legally obligated to perform; whether the service is provided by the utilization of either vehicles, facilities, or personnel which are necessary to the performance of the line-haul movement itself; whether it is economically feasible for the carrier to render the line-haul transportation without also providing the special service under consideration; whether the time period required to perform the special service is a reasonably minor one of lesser significance when compared to the total operation in question; whether the special service is of a type normally provided to, or required by members of the same industry sought to be served by the applicant; and whether the rendition by the carrier of the special service is a precondition to the movement of the goods in for-hire transportation service. The proper use of these standards, together with other factors

that may arise in particular cases, should assist us in distinguishing between those necessary and incidental services forming a legitimate part of a transportation proposal, and schemes by which some would offer novel and unneeded nontransportation services as a means of thwarting the sincere efforts of existing carriers to provide economical and efficient service within the scope of their authorities.

It should be further noted that although there is but one definition of transportation under part II of the act, it does not follow that a carrier, whether common or contract, must engage in the entire spectrum of transportation services. Generally, a common carrier may provide any service except one inconsistent with a public holding out. See *Craig Contract Carrier Application,* 31 M.C.C. 705, 712 and 715. Contract carriers have traditionally performed services beyond those normally provided by a common carrier because of the latter's obligation to serve the general public without discrimination as to service or charges. Contract carriers are free to pick and choose among shippers and may lawfully discriminate both as to services and charges for the same shipper as well as different shippers. *Keystone Transp. Co. Contract Carrier Application,* 19 M.C.C. 475, 491; and *Baggett Transp. Co.—Petition for Exemption,* 61 M.C.C. 771, 778. In numerous past instances common carriers have undertaken to provide services not strictly related to line-haul in order to compete effectively with contract carriers, as well as to displace proprietary trucking. In *Wiegler Contract Carrier Application,* 79 M.C.C. 777 (1959), division 1 granted common carrier authority to transport uncrated refrigerated display cases, and described related products, where the proposal included dismantling, repair, and installation of new and used refrigerator units. The following statement summarized such grant of common carrier authority, (at page 780):

> We come then to the question whether the proposed service is required by public convenience and necessity.

The uncontradicted evidence of record establishes that the transportation and installation of new units and the dismantling and return of used or damaged units is essential to the shippers in the successful conduct of their business. Most of the shippers are not equipped to render this service themselves, and no other carrier has evinced an interest in it. The shippers have used applicant's service exclusively for several years and know of no other motor carrier capable of performing such service. In the circumstances, we are of the opinion that a need for the proposed service has been shown, and that a grant of authority therefor is warranted.

THE FACTS AND THE PLEADINGS

Facts.—The facts are not disputed. Applicant proposes, and each of the five supporting shippers expresses need for, the assignment of at least one motor vehicle with driver to each shipper's exclusive use. The trailer movements for which the supporting shippers claim to require applicant's proposed service are of three general types: (1) the movement from points outside of Oklahoma to their Oklahoma lots of used trailers purchased by the supporting Oklahoma dealers for subsequent repair and resale (inbound "secondary" movements), (2) the transportation of new trailers from factories outside of Oklahoma to dealers' lots in Oklahoma, or from a supporting shipper's plants at Chickasha and Ponca City, Okla., to dealers' lots outside of Oklahoma, ("initial" movements), and (3) the movement of new and used trailers from dealers' lots in Oklahoma to retail purchasers outside of Oklahoma (an outbound retail delivery service in "secondary" movements).

In connection with the movements in (1) above, applicant's drivers will prepare the trailers for transportation at their point of origin. This preparation or "repair" service entails bracing the inside of the trailers, covering the windows, and checking and repairing the undercarriages

—all directed to making the trailers safe for carriage over the public highways and assuring their delivery to the consignees without further deterioration. In connection with the movements in (2) and (3) above, the drivers will set up the trailers at destination—a service which might entail blocking, unblocking, assembling of dinette sets or other furniture, connecting electrical and plumbing services, making minor repairs, and expanding "expando" trailers.[2] The motor common carriers which oppose the application hold themselves out to provide all of the proposed services except the making of repairs, connecting utility facilities, and setting up "expando" trailer units. The court's instructions to this Commission are principally directed to these particular services.

Pleadings.—The position of the Common Carrier Conference is that this Commission's jurisdiction in proceedings involving applications for operating authority is limited by the terms of the act to a consideration of "transportation services" only; that such "transportation services" consist solely of pickup, line-haul, and delivery; that the accessorial services proposed by applicant are not of such character; that the opposing common carriers can provide all of the actual transportation shown to be required; and that, in the light of such circumstances, the proposed rendition by applicant of allegedly nontransportation accessorial services cannot form the basis for a grant of the sought contract carrier authority.

The Contract Carrier Conference replies that the requirements of the complete service for which a need had been shown encompass both line-haul transportation and the proposed extra services; that exclusion from our consideration of these accessorial services in the circumstances here disclosed would destroy the utility of the proffered service to the supporting shippers; that the question of

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[2] An "expando trailer" can be expanded to larger dimensions at destination points or folded up for towing on the highway.

whether or not a particular ancillary service is a transportation service is a question of fact for the Commission's determination under the relevant provisions of the act; that the Commission has applied in the past, and should apply in the future, a more liberal interpretation to a determination of what constitutes a transportation service in connection with proposed contract carrier application proceedings; and that the involved accessorial services should be construed as transportation services since, absent their rendition for the supporting shippers, the traffic would continue to be handled in private carriage to the detriment of applicant and without concomitant benefit to the opposing common carriers.

SUPPORTING EVIDENCE

As previously pointed out, the mobile home movements involved in this proceeding are of three general types, and the facts pertaining to each of these will next be examined so as to provide a basis for making the transportation-nontransportation distinction demanded by the court, and to serve as a framework within which to apply the statutory standards embodied in sections 203(a)(15) and 209(b) of the act. Applicant here proposes to serve, at most, five shippers by assigning motor vehicles with drivers to exclusive use of each of them.

1. *Inbound "Secondary" movements.*—The four mobile home dealers supporting the application[3] require applicant's proposed service for the movement from points outside of Oklahoma to their Oklahoma lots of used trailers purchased by them for subsequent repair and resale. *B & B* buys used trailers throughout the United States. Most of these trailers are acquired as trade-ins but this dealer also buys them from individuals or from finance companies. At the present time, the mobile homes so purchased are

[3] B & B Mobile Homes, Wheeler Trailer Exchange & Park, Baker, Mobile Home Sales, and George Lane Mobile Homes.

transported in proprietary carriage to B & B's lots in Oklahoma City or Lawton, Okla. This dealer has not used the services of existing common carriers for any of these inbound movements, and it asserts that none of the three protesting carriers[4] was able to furnish the requisite equipment to move a trailer purchased by it in Pensacola, Fla., just prior to the hearing (May 24, 1962). Its purchasing schedule normally depends upon its retail sales, and expeditious service is required on occasion. A winch truck, such as would be available from applicant on an on-call basis, was required not long prior to the hearing in connection with the movement of a repossessed mobile home. *Wheeler* has purchased used and salvaged house trailers in Amarillo, Tex., Albuquerque and Grants, N. Mex., and at other undisclosed points in Texas, New Mexico, and Florida. Although there is no division as to the volume of used and salvaged trailers handled by it, this dealer buys an average of 100 new and used mobile homes a year for movement to its Oklahoma City lot. The salvaged trailers, which range all the way from slightly to totally damaged, are bought through insurance bids and rebuilt by this dealer in Oklahoma City.

Baker, during the year prior to the hearing, purchased used trailers from points in Arkansas, Texas, New Mexico, Colorado, Kansas, Missouri, and Mississippi. About 100 such used trailers are purchased by this dealer each year. They are bought in single lots and in large numbers, sometimes as trade-ins and sometimes as repossessions. Some have no undercarriages and are not roadable without a certain amount of repair service. The services of Morgan and National have been used occasionally on certain inbound movements of the used trailers. *George Lane* anually purchases from 120 to 140 used, damaged or repossessed mobile homes at points throughout the central

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[4] National Trailer Convoy, Inc., Morgan Drive-Away, Inc., and Transit Homes, Inc.

and southern portions of the United States. Approximately one-third of its total business involves the purchase of damaged house trailers which are brought to Oklahoma City, repaired, and then sold to retail customers as used trailers. Some of the used trailers obtained by this dealer must be braced so that they can be hauled over the public highways. Additionally, a number of the damaged trailers are "expandos" that are required to be folded up for movement. Certain of these trailers are purchased on a delivered price basis, but George Lane must then wait for the seller to provide the necessary transportation. This dealer owns and operates one truck and has not used protestants' services because they do not offer to provide the necessary preliminary repair service. Applicant's service has been used with satisfactory results within Oklahoma.

2. *"Initial" movements of new trailers.*—A mobile home manufacturer supports the application to the extent that it seeks authority to transport new mobile homes from points in Oklahoma to points outside of Oklahoma, while the four supporting dealers discussed previously support the application to the extent that authority is sought for the transportation of new trailers from factories outside of Oklahoma to their Oklahoma lots. Chickasha Mobile Homes, Inc., a wholly owned subsidiary of Founders Investment Corporation, manufactures mobile homes in Chickasha and Ponca City, and Vidalia, Ga., and distributes them to dealers located in an area extending from North Carolina on the east and north to Nevada on the west. About 35 units a week are manufactured at its Oklahoma plants and these range in length from 35 to 60 feet with widths of from 8 to 10 feet. One-sixth of the mobile homes produced by this shipper are "expandos." Only about 10 percent of the shipper's total Oklahoma production is transported in for-hire carriage (by National); the shipper transports approximately 60 percent of such production with the 30 vehicles owned by it, and the remainder move in vehicles owned and operated by

various consignee dealers. This manufacturer expects applicant to assign both equipment and drivers for its exclusive use, and it will call upon applicant's drivers to perform the same accessorial services as are now provided by its own employees. These services include (A) spotting and blocking the trailer on the dealers' lot; (B) removing tape from the drawers, unblocking the doors, setting up dinette sets, and otherwise putting the mobile home in condition for immediate display; (C) making minor repairs of damages incurred in transit; (D) collecting any c.o.d. charges that may be owing; and (E) setting up and expanding the "expando" trailers. National does not always make the services of the same driver available, and this lack of driver consistency results in a less personalized service than is rendered by the shippers' own drivers. National offers to perform all of the services numerated above except (E) setting up and expanding the "expandos;" however, it has been the shipper's experience that National's drivers are less courteous to dealers than its own, that such drivers do not set up the trailers for display at destination approximately 50 percent of the time, that it has been unable to obtain the necessary equipment from National to handle 60-foot trailers in certain States (New Mexico, Kansas, and Missouri) because of overall State length requirements, that at least two dealers (located at Gillette, Wyo., and Grand Junction, Colo.) refuse to accept any trailer delivered by a National driver, and that National will not assure the shipper that the same driver will handle the trailer through to destination. The evidence does indicate, however, that Morgan handled a number of trailers from Chickasha for this shipper in the spring of 1962 without complaint.

Three of the four supporting mobile home dealers submitted evidence as to their need for applicant's proposed service with respect to movements of new house trailers from factories and manufacturers' depots outside of Oklahoma to their lots within Oklahoma. *B & B*, which has

sales locations in Columbus and Biloxi, Miss., commenced retailing trailers in Lawton and Oklahoma City about 1 week and 3 months, respectively, prior to the hearing. During that time it had received two new mobile homes at its Lawton lot and a total of about 15 trailers (whether new or used is not indicated) at its facilities in Oklahoma City. Morgan transported the two trailers to Lawton at the direction of the factory (Detroit Mobile Homes, apparently of Hutchinson, Kans.), but delivered them on a date other than that expected by the consignee and placed them on the Lawton lot in the absence of the consignee. Those delivered to the Oklahoma City lot were transported by equipment operated either by this dealer in private carriage or by the factories from which they were purchased. This dealers' two vehicles, primarily used in its Mississippi operations, are only utilized in its Oklahoma operations in emergency-type situations, and B & B desires to have available for the latter operations the service here proposed by Griffin. The dealer believes that applicant's drivers would inspect the trailers a little more closely before accepting them at the factory.

Wheeler is a franchised dealer for Melody Homes, of Fort Worth, Tex. Its representative surmised that the new trailers received by it have been transported by either Morgan or National, but failed to state the volume so handled, whether it or the manufacturer controlled the designation of the carrier, or just what services would be required in connection with the movement of new trailers inbound to its Oklahoma City facilities.

Baker purchases for delivery to its Oklahoma City lot from 100 to 170 new mobile homes each year. Currently, these trailers are obtained from factories located, at among other points, Grand Island, Nebr., Great Bend, Kans., Vicksburg, Miss., Texarkana, Arlington, and Bonham, Tex., El Monte, Calif., and Tulsa, Okla.; but the changing requirements of this dealer's business require that it buy

from other factories throughout the United States depending upon the brand and model it desires. The trailers move from the factory to the dealer's Oklahoma City location either in its own trucks, of which it now owns four, or in the service of Morgan or National. Baker has found the services of Morgan and National to be "fine," except that on four occasions in the 2 months preceding the hearing Morgan's drivers refused to spot the incoming trailers on the dealer's lot and instead parked it on an adjacent street. It also appears that Morgan and National have occasionally been unable to provide equipment for certain rush movements from a factory, but no details about such instances are of record. Although this dealer is mainly interested in using applicant's proposed service in retail delivery operations from Oklahoma City, it desires the dedication of equipment and driver trained to set up new trailers on its lot as proposed by Griffin.

3. *Outbound retail delivery service.*—All four mobile home dealers support the application to the extent authority is thereby sought to transport house trailers from their Oklahoma lots to retail customers located throughout the described 33-State area. *B & B* ships about 100 trailers a year from each of its two sales locations (Lawton and Oklahoma City), approximately 25 percent of which move to interstate destinations. These trailers ordinarily are sold on a delivered-price basis and the shipper then undertakes to ready them for use upon their arrival at destination. This setting-up service may include the making of both plumbing and electrical connections. The shipper does not request commercial carriers to handle these shipments because it does not believe that it can depend upon them to set up the trailers properly. This is particularly true in connection with the movement by such for-hire carriers of an "expando" trailer where the shipper either would have a man trail the shipment to perform the setting-up service, or sell the trailer at a lower, not-delivered price. Inasmuch as an expedited service very

often is required by this shipper, it would be beneficial to have equipment immediately available for its use. If the instant application is granted, the shipper expects applicant to assign to it at least one motor-vehicle with driver who would be trained to expand "expandos."

Wheeler uses its own equipment to deliver approximately 100 mobile homes each year out of its Oklahoma City lot. The service it desires, and that which applicant here proposes to provide, includes the line-haul movement of its trailers, their delivery and setting up, and the procuring from the consignee of a signed receipt for the delivered trailer. If such service is made available, this shipper would not only be permitted to decrease the number of its employees and thereby reduce its insurance costs which are based upon that number, but also it assertedly would result in better overall service to its retail customers. This dealer is said to have been informed by a National driver that the three protesting motor carriers do not provide these services and it, therefore, has not formally asked these carriers to render such services. It desires Griffin's proposed service to replace its present proprietary operation.

Baker uses its own four power units to deliver house trailers to retail customers throughout the territory here under consideration. Title to a trailer thus sold does not pass until it is set up in the customer's location, and under the usual sales contract the purchaser need not accept delivery until the trailer is ready for use. The destination preparation services thus required are performed by the shipper's own drivers and may include trailer expansion services and the connecting of sewer, gas, electrical, or water lines. The shipper desires to replace its private trucking activities with the for-hire services here proposed by Griffin. It would expect Griffin's drivers to perform all of the above setting-up services, particularly including the expanding of "expando"

trailers. On one "expando" unit transported by Morgan or National to Kansas for this shipper, it was required to send its own employees to perform the delivery preparation and trailer expansion services. Morgan and National do sometimes furnish the shipper with its favorite drivers, but these are not always available. The shipper has neither used the services of nor been solicited by Transit Homes.

George Lane in 1961 and during the first 4 months in 1962 sold approximately 27 trailers that moved to interstate destinations. A number of these were transported by the shipper's own truck, others were transported by applicant to the State line and there delivered to the purchasers for ultimate movement beyond; and approximately 50 percent were moved by the purchasers from Oklahoma City after the shippers discounted its price to compensate for its inability to deliver the trailers and set them up at destination. This shipper represents that its sales often depend on immediate delivery, and that it requires a carrier whose services would be immediately available to it. It desires to discontinue its private carriage, and through the use of applicant's proposed service it hopes to sell more of its trailers on a delivered-price basis, thereby eliminating the competitive handicap under which it now operates.

Discussion and Conclusions

Following the decision of *Interstate Commerce Commission* v. *J-T Transport Co.*, 368 U. S. 81 (1961), the *total* service proposal has been the spool on which determination of contract carrier applications has been wound. In that case the Supreme Court, at pages 92 and 93, observed:

> The "distinct need" of the shipper may nevertheless not be served by existing services, if the new service is better tailored to fit the special require-

> ments of a shipper's business, the length of its purse, or the select nature of the delivery service that is desired.

This was premised upon the court's view that one of the purposes of the 1957 amendments to sections 203(a)(15) and 209(b) of the act was to focus Commission attention upon the supporting shipper's business needs which are now to be balanced against the impact which issuance of the authority sought would have upon the services of existing carriers.

To effectuate the explicit mandate of the district court, however, we must first distinguish between the transportation and nontransportation needs of the supporting shippers; and before giving weight to the shippers' distinct needs we must determine that those needs pertain to a transportation service.

The kaleidoscopic collage of tests previously set forth in this report to determine the transportation-nontransportation equation, is commonly threaded by the incidental-to-transportation standard. In discussing the incidental-to-air exemption in section 203(b)(7a) of the act, the United States District Court for the Northern District of Illinois in *National Bus Traffic Association* v. *United States*, 249 F. Supp. 869 (1965), affirmed 382 U. S. 369 (1966), stated at page 873:

> As the court views the word "incidental" it means a minor adjunct to the prime matter, of lesser significance, but related and necessary to the complete effectuation of the matter in chief.

We believe the above definition of "incidental" to be useful in determining whether the applicant's proposed services are "incidental" to the movement of house trailers from one place to another.

All four dealers say that the movement of damaged trailers requires that the carrier provide a special "repair"

service at their point of origin. Such service includes bracing the inside of the trailer, covering the windows, and checking the undercarriage to insure its safety for highway travel and to make certain that the trailer will arrive at its destination in a reasonable condition. These are services which are not proffered by existing common carriers and which applicant here offers to provide. In our opinion, these preparatory services are a necessary and incidental part of the safe line-haul movement and properly may be considered by us in determining the outcome of the application. Indeed, without such services, the trailers would be incapable of movement over the public highways. They are performed after the mobile homes have been received by the carrier and while the trailers are in the custody and control of the carrier. Their rendition does not appear to require an inordinate period of time and, it is not economically practicable for someone other than the carrier to render these special services apart from the line-haul transportation. These services are of a type normally associated with the movement of used and damaged trailers by members of the mobile home industry. All circumstances considered, we deem these conditioning services to be an incidental and integral part of applicant's proposed transportation service, indivisible from the line-haul movement and essential to its effective performance.

Although the services proposed by applicant in connection with initial movements of new trailers are highly personalized, the only extra services involved which may conceivably be classified as nontransportation activities involve the setting up of trailers upon delivery at dealers' lots, including the expanding of expando-type trailers. In our opinion, the relatively simple services of removing tape from the drawers, unblocking the doors, assembling dinette sets and other furniture, and similar activities are unquestionably transportation-connected services. The more complex task of expanding "expando" trailers is a

closer question, but we think that it is a transportation service which may properly be considered in determining the merits of this aspect of the application. Both services are performed while the trailers are in the control and custody of the carrier, and delivery is made to a dealer in both instances. The first services are relatively minor ones consuming only a small amount of time and requiring virtually no training whatever. They are services normally provided to and required by members of the mobile home industry and are ones usually expected of a carrier serving that industry. On the other hand, the expanding of "expando" trailers for public display requires special training and takes, perhaps, 1 or 2 days to complete. It is a more complex operation not necessarily expected of, or provided by, for-hire carriers experienced in mobile home transportation. Such expansion services are necessary to the effectuation of the matter in chief, however, because otherwise the supporting shippers are required to send one of their own employees to the delivery site to provide such service before acceptance is given by the consignee. In such event, the house trailers would simply not be tendered to a for-hire carrier because of the prohibitive cost.

In regard to the outbound retail delivery service, we are of the opinion that the trailer expansion services as well as the connection of plumbing and electrical lines, as here proposed by applicant and shown to be required by the supporting trailer dealers, are also transportation services to be considered in deciding whether this application should be granted or denied; and that the remainder of the retail setting-up services are a necessary and incidental part of the total transportation activity and properly may be so considered. The relatively simple services of trailer blocking, setting up dinette sets and other furniture, and similar activities are minor adjuncts to the prime matter (the delivery of a trailer) and essential to its effective performance. As to the trailer expansion

services, moreover, the identity of the consignee represents the sole distinction that may be made between its performance in retail delivery service and its accomplishment in connection with the delivery of new trailers to dealers' lots as previously described. This factor, viewed in the light of the other secondary criteria discussed at an earlier point in this report, seems to us to outweigh the complexity of the expanding operation, the higher degree of special training and skills which it necessitates, and the length of time (perhaps 1 or 2 days) consumed by its effective performance. So too, we believe that the electrical and plumbing services are transportation services which for-hire motor carriers could be expected to provide. It is not economically feasible for the supporting shippers to tender house trailers for line-haul transportation by for-hire carriers that do not provide such special services. Also, the utility connections are performed while the trailers are still in the custody of the carrier and before acceptance of delivery by the consignee.

In summary, we conclude that applicant's proposal to condition used trailers for over-the-road movement, connect electrical and plumbing facilities and expand and set up "expando" home trailers at destination, are transportation services which may be considered in determining whether issuance of a permit is consistent with the public interest and the national transportation policy. Such services are either now provided by the common carrier protestants, or could be so provided. The spur of competition may be effectively applied in this instance to encourage the protestant carriers to meet the stated needs of the supporting shippers, and supplant the extensive proprietary trucking now being conducted by them. The specialized services programmed by applicant are incidental to the movement of the house trailers from one place to another and are necessary to the complete effectuation of the matter in chief. Such services are part of the

total transportation service proposal and must be considered in disposing of the instant application.

Weighing the merits of the application in accordance with the criteria embraced in section 209(b) of the act as interpreted in the *J-T Transport* case, *supra,* we believe that applicant should be awarded authority to transport house trailers between points in Oklahoma, on the one hand, and, on the other, points in the 33-State territory sought. Applicant here proposes to serve five shippers by assigning motor vehicles with drivers to the exclusive use of each of them. Consequently, the proposed services, are, we conclude, those of a contract carrier by motor vehicle as defined in section 203(a)(15) of the act.

We are convinced that the supporting shippers have a distinct need for a *transportation* service more specialized than that now being provided by existing common carriers, and that the protesting motor carriers have not shown that they will satisfy the specialized need. The sale of mobile homes, particularly to retail customers, often is dependent upon the ability of the dealer to provide immediate delivery, and the competitive nature of the mobile home industry dictates that its members be able to provide such deliveries on short notice. The evidence here is persuasive that the supporting mobile home dealers and manufacturers have been forced in the past to rely primarily upon private carriage to transport their trailers or to discount the price of the trailers to offset their inability to provide deliveries.

Applicant has conclusively demonstrated that the service which it here proposes is specialized and tailored to the proven distinct *transportation* needs of the supporting Oklahoma shippers. It will assign vehicles to the exclusive use of each of these shippers and will provide each shipper with regularly assigned drivers whom they will be able to train and upon whom they can thereafter rely to perform the requisite services. None of the protestants

has indicated any significant participation in this traffic, very little of which has heretofore moved in public carriage. They do not offer to provide the necessary transportation services and have not succeeded in establishing that they can meet the distinct transportation requirements of the supporting shippers as well as or better than can applicant. The supporting shippers are not using the services of protesting common carriers in any substantial way and it appears that they would not utilize the services of such carriers even if this application were denied. Protestants have not shown that they will have any traffic diverted from their services or that this is an "unusual" case in which the grant of authority to a newcomer would have an adverse effect on them. Cf. the *J-T Transport* case, 368 U. S. at 93. In all events, any ill effects which a grant of authority might have upon the protestants' services would be outweighed by the advantages that would accrue to the supporting shippers from the availability to them of applicant's proposed dedicated services which may be likened to those of a "house carrier." While denial of the application would have no apparent adverse effect upon applicant, which does not now operate in States other than Oklahoma, a failure to grant such authority would deprive these supporting shippers of a service particularly well suited to meet their transportation requirements without any concomitant benefit to the protesting motor carriers. The fifth criterion of section 209(b), pertaining to the changing character of the shippers' requirements, does not appear to be a significant factor in this case, although to the extent it is pertinent, it strengthens the basis for granting authority herein. We conclude that, weighing in balance the section 209(b) criteria, applicant has made the requisite showing of a need on the part of the supporting shippers for a specialized transportation service as hereinafter indicated which cannot satisfactorily be met by existing motor common carriers.

FINDINGS

Upon reconsideration, we find that operation by applicant, in interstate or foreign commerce, as a contract carrier by motor vehicle, over irregular routes, of house trailers between points in Oklahoma, on the one hand, and, on the other, points in Alabama, Arizona, Arkansas, California, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, Ohio, Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah, Washington, Wisconsin, and Wyoming, limited to a transportation service to be performed under a continuing contract or contracts with B & B Mobile Homes, Baker Mobile Home Sales, Inc., George Lane Mobile Homes, and Wheeler Trailer Exchange & Park, all of Oklahoma City, Okla., and the Founders Investment Corporation, of Kansas City, Mo., will be consistent with the public interest and the national transportation policy; that applicant is fit, willing, and able properly to perform such service, and to conform to the requirements of the Interstate Commerce Act and our rules and regulations thereunder; and that a permit authorizing such operations should be granted.

Upon compliance by applicant with the requirements of sections 215, 218, and 221(c) of the act, and our rules and regulations thereunder, and with the requirements established in *Contracts of Contract Carriers*, 1 M.C.C. 628, within the time specified in the order entered concurrently herewith, an appropriate permit will be issued.

An appropriate order will be entered.

COMMISSIONER MURPHY, concurring:

I believe the application should be granted, but do not subscribe to certain of the rationale and findings in the report of the majority. As indicated by the numerous decisions cited in the report, the Commission has given

weight to or at least has noticed a wide variety of "extra" services in disposing of motor carrier operating authority applications. In a few of these decisions an effort was made to determine whether every aspect of the proposal of the applicant qualified as a transportation service, but in most of the cited cases the character of the "extra" service was not even considered. Nonetheless, out of those various decisions the majority seeks to distill a number of "facts" or criteria which will assist in deciding what is and what is not a transportation service. All the "facts" are enlightening and most, such as "whether the service is provided by the utilization of either vehicles, facilities, or personnel which are necessary to the performance of the line-haul movement itself," have an obvious validity, but the weakness of the "facts" or criteria is that they can be applied in any manner that suits the whim of the decision maker. For example, in support of the conclusion in the report that the expansion of "expando" trailers is a transportation service, substantial weight is given to the question "whether the rendition by the carrier of the special services is a precondition to the movement of the goods in for-hire transportation service," whereas it would be just as reasonable to stress the admitted complexity of the expanding operation, the substantially higher degree of special training and skill which it necessitates, and the disproportionate length of time consumed by its effective performance.

Apparently in recognition of this weakness, the majority would add a definition of the term "incidental" as that term appears in the air related exemption of section 203 (b)(7a) of the act as still another factor to be considered in deciding what is a transportation service.

The foregoing consideration, of course, has been superimposed in the report upon the statutory definition of "services" and "transportation" of section 203(a)(19) of the act, and also upon the "necessarily incidental" standard formulated in the *Warehousing* cases, the net

effect of all of which, I think, is to create an undue amount of confusion.

Turning to the merits of this matter, I believe it reasonable to find that a carrier engaged in the business of transporting used, damaged, or repossessed mobile homes has an obligation to be prepared to do or arrange for a modest amount of work necessary to make the trailer transportable. By the very nature of the business the carrier holds itself out to transport less than perfect trailers, and it is difficult to conceive of a carrier engaging therein without making or at least providing for the services necessary to make the trailers roadworthy. (Reference to applicant's schedule of charges shows that the services provided are modest, that the consignee and consignor have obligations to provide certain necessary facilities, that all services require specific reimbursement, and that there is no inherent requirement that the work be physically performed by applicant's drivers.)

As to the blocking, setting up, and expansion of trailers, it appears to me that the services proposed by applicant are akin to the necessarily incidental rigging which is performed by heavy haulers and other specialized carriers, differing significantly from the traditional services of such carriers only in that the commodity transported is new and has unusual characteristics. Some might reasonably insist on a better record basis for equating trailer expansion to rigging, but I think that there is a satisfactory basis for making the rigging analogy, and also that it is self-evident that transportation services cannot be limited to a particular group of traditional commodities.

Finally, as to the plumbing and electrical services, it appears that the majority is dealing with somewhat of a "red herring." Applicant's schedule of charges, while specifically naming all the other considered services, makes no reference to utility connections. Moreover, I think it completely unnecessary for the success of applicant herein

that the transportation or nontransportation nature of electrical and plumbing services be identified, it being enough to note that protestants apparently do not offer several of the extra services specified in applicant's schedule of charges. However, since the majority has committed itself to the conclusion that "the electrical and plumbing services are transportation services which for-hire motor carriers could be expected to provide," I wish to record my disagreement therewith. Utility connections are closely regulated by local governmental units, and I think that it is unreasonable to even partially base a grant of authority involving almost 3 dozen States and hundreds of local governments upon the refusal of existing carriers to provide such services.

The fact that the majority has decided to encumber this decision by giving weight to all the various extra services lends credence to the concern that almost any proposed service will be similarly considered and that entry controls imposed by Congress in order to forestall ruinous competition among motor carriers will be diluted by the necessity to grant applications based upon novel features of infinite variety. Nevertheless, as previously indicated, I believe the grant of authority herein is warranted and thus concur in the result.

COMMISSIONER GOFF, concurring:

I believe that the record adequately supports a grant of authority without finding that the erecting of "expandos" is a transportation service in initial movements to the dealers' lots. Those dealers should be expected to have the necessary equipment and personnel to set up those trailers and it should not be required of the carrier as an incidental transportation service. This is not so in outbound movements where the scattered, individual users would not have the ability and tools to set up the trailer. That service in those cases would be an incident of the total transportation.

COMMISSIONER BUSH, whom COMMISSIONER TUGGLE joins, dissenting in part:

I dissent in this proceeding for I cannot agree with the decision finding applicant's proposed trailer expansion service and the connection of plumbing and electrical facilities to be transportation services.

In my view, the expansion service may be likened to the servicing of automobiles after delivery from the factory to a local dealer *(Kenosha Auto* case, *supra)* which the court in remanding this proceeding observed "would seem to be divorced from transportation." The special training and skills required for the proper performance of safe electrical and plumbing services leads me to the conclusion that these services similarly and certainly are not transportation services. Rather, these are services that would seem more properly to be left to specialists having knowledge of the applicable housing regulations, building codes, and other factors pertinent to each locality to which the mobile homes are delivered.

Going as far as the majority has in this case could completely destroy any line between transportation and nontransportation services. Any number of reasonably comparable "extra services" might be offered by future applicants, and I anticipate they will be so proposed. Under the precedent established by this decision, how could we say "no"?

It seems clear that the point has been reached where a full rulemaking proceeding should be conducted for the purpose of determining what services are transportation services and what are nontransportation services. Pending a decision in such proceeding, those services which can reasonably be considered to fall in the "doubtful" category should not be characterized as transportation services.

COMMISSIONER FREAS, dissents.

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 30th day of December 1966.

No. MC-124190

GRIFFIN MOBILE HOME TRANSPORTING CO. CONTRACT CARRIER APPLICATION

It appearing, That on January 9, 1963, the Commission, division 1, made and filed its report, 91 M.C.C. 801, and order in the above-entitled proceeding, granting the application in its entirety;

It further appearing, That on March 20, 1964, the United States District Court for the Northern District of Oklahoma, entered its judgment in No. 5760, *National Trailer Convoy, Inc., et al.* v. *United States of America, et al.,* 227 F. Supp. 730, remanding this proceeding to the Commission for further action in accordance with the views expressed in its opinion;

It further appearing, That by order of May 19, 1964, this proceeding was reopened by the Commission for reconsideration on the present record;

And it further appearing, That reconsideration of the matters and things involved in the above-entitled proceeding has been given, and that the Commission, on the date hereof, has made and filed a report on reconsideration herein containing its findings of fact and conclusions thereon, which report, and the said report of January 9, 1963, are hereby referred to and made a part hereof;

It is ordered, That the said order of January 9, 1963, be, and it is hereby, vacated and set aside.

It is further ordered, That unless compliance is made by applicant with the requirements of sections 215, 218, and 221(c) of the act within 90 days after the date of service

hereof, or within such additional time as may be authorized by the Commission, the grant of authority made in said report shall be considered as null and void and the application shall stand denied in its entirety effective upon the expiration of the said compliance time.

By the Commission.

H. NEIL GARSON,
Secretary.

(SEAL)

APPENDIX E

INTERSTATE COMMERCE COMMISSION

Served August 29, 1962

NOTICE TO THE PARTIES

Exceptions, if any, must be filed with the Secretary, INTERSTATE COMMERCE COMMISSION, Washington, D. C., and served on all other parties in interest, within 30 days from the date of service shown above, or within such further period as may be authorized for the filing of exceptions. At the expiration of the period for the filing of exceptions, the attached order will become the order of the Commission and will become effective unless exceptions are filed seasonably or the order is stayed or postponed by the Commission. To be seasonally filed, exceptions must reach the Commission on or before the date they are due. If exceptions are filed, replies thereto may be filed within 20 days after the final date for filing exceptions. If the recommended order becomes effective as the order of the Commission, a notice to that effect, signed by the Secretary, will be served.

No. MC-124190

GRIFFIN MOBILE HOME TRANSPORTING CO.,
CONTRACT CARRIER APPLICATION

Decided .....

Operation by applicant as a contract carrier by motor vehicle, over irregular routes, of house trailers, between points in Oklahoma, on the one hand, and, on the other, points in 33 States found not shown to be consistent with the public interest and the national transportation policy. Application denied.

W. T. Brunson and *Charles D. Dudley* for applicant.
John E. Lesow and *Bill R. Privitt* for protestants.

REPORT AND ORDER

RECOMMENDED BY DALLAS B. RUSSELL, HEARING EXAMINER

By application filed February 5, 1962, Griffin Mobile Home Transporting Co., of Midwest City, Okla., seeks a permit authorizing operation, in interstate or foreign commerce as a contract carrier by motor vehicle, over irregular routes, of house trailers, between points in Oklahoma, on the one hand, and, on the other, points in Alabama, Arizona, Arkansas, California, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, Ohio, Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah, Washington, Wisconsin, and Wyoming.

The application was referred to the examiner for hearing and the recommendation of an appropriate order thereon. Hearing was held on May 24, 1962, at Oklahoma City, Okla. Morgan Drive-Away, Inc., Transit Homes, Inc., and National Trailer Convoy, Inc., hereinafter referred to as

Morgan, Transit, and National, respectively, oppose the granting of the application.

Applicant presently holds no authority to conduct operations in intrastate or interstate commerce. The controlling stockholder of applicant (Jack L. Griffin, hereinafter called Griffin) holds intrastate authority (permit No. 11493) which authorizes him to tow house trailers to and from all points in Oklahoma. This common carrier intrastate authority has been registered with the Interstate Commerce Commission (No. MC-120929), and operations are being conducted under the second proviso of section 206(a) of the Act. Griffin owns and operates five pieces of power equipment (ranging in overall lengths of from 11 feet to 15 feet), all of which are designed and used for the pulling or towing of house trailers. In addition, this individual owns some house trailers which are rented to individuals. He also owns and operates an automobile repair shop. Sometime in 1958, a corporation controlled by Griffin sought common carrier authority to transport house and utilities trailers between points in Oklahoma, on the one hand, and, on the other, points in the United States. This application (No. MC-117756) was denied by the Commission, division 1, in its report decided March 29, 1960.

Griffin's intrastate rights were registered with the Commission approximately one year ago, and he is actively engaged in the movement of new and used mobile homes. It is estimated that from 20 to 35 trailers are handled monthly in intrastate commerce, and since registration of the rights he has participated in the movement of from 12 to 18 trailers destined to points outside Oklahoma. He provides, in addition to the movement of the trailer homes, certain accessorial services, such as preparing the trailers for movement and setting up trailers at the point of delivery either for the individual purchaser or for display purposes on dealers' lots. The accessorial services entail blocking, unblocking, setting up the furniture and possibly other fix-

tures in the trailers, hooking up plumbing and electrical utilities, and expanding or extending the expando type trailers. He handled a total of three of the expandos during April 1962. This individual alleges full compliance with the Commission's safety rules and regulations. He was, however, fined $1,000 by the U. S. District Court for the Western District of Oklahoma upon a plea of guilty to an information charging interstate operations beyond the scope of the registered rights in violation of Part II of the Act.

The applicant corporation is inactive at the present time, but if the instant application is granted the motor vehicle equipment and the intrastate rights of Griffin will be transferred to it. Applicant proposes to serve a limited number of shippers, and will provide under contract to such shippers equipment and drivers sufficient to meet their needs and for their exclusive use. It proposes to offer, in addition to transportation, any additional services which may be needed or required by shippers.

As of May 22, 1962, Griffin's total assets were $133,596.62, whereas total liabilities were only $26,833.82, thus a net worth of $106,762.80. The applicant corporation at the time of hearing had no net worth. The pro forma balance sheet submitted, however, shows that in the event operations are instituted this corporation would have total assets of $12,100, including cash of $2,000, operating equipment valued at $8,600, and Oklahoma intrastate rights valued at $1,500.

The application is supported by four dealers of new, used, or damaged house trailers, and a manufacturer of mobile homes. The latter, the Founders Investment Corporation of Kansas City, Mo., has a subsidiary company (Chickasha Mobile Homes, Inc.), which manufactures mobile homes at Chickasha and Ponca City, Okla., and Vidalia, Ga. The facilities at Chickasha manufactures about 35 mobile homes a week, ranging in length from 35 feet to 60 feet, with widths

of from 8 feet to 10 feet. About 50 percent of all trailers manufactured are 60 feet in length. Distribution of the mobile homes is made through dealers located in an area extending as far west as Nevada, thence north to the Canadian line. Mobile homes are primarily delivered to dealers in equipment owned and operated by the manufacturer, or in vehicles owned and operated by the various dealers. Shipper owns 30 units of equipment and transports about 60 percent of its Chickasha and Ponca City volume. About 10 percent or 2 or 3 trailers a week are handled out Ponca City by National. This carrier is also used occasionally for shipments moving from the Chickasha plant.

When deliveries are made in company-owned equipment, shipper's drivers are responsible for spotting and blocking the mobile homes on dealer lots, setting up dinette sets and otherwise placing the home in condition for display, making minor repairs, and at times collecting C.O.D. charges. In addition their duties are to set up and expand the expando type trailers. The latter represents about 16 percent of the total production. Shipper will sign a contract with the applicant, and expects the carrier to furnish equipment for its exclusive use. It is further expected that applicant's drivers will be called upon to perform the same accessorial services as are now provided by shipper's own employees. Shipper has some repossessed trailers returned to the plant for reconditioning.

Shipper has found that existing motor carriers do not perform a personalized service in the way of setting up and expanding homes, however, National at times will set up those coaches which are not expandable. In addition, other objections to this carrier's service are that the same driver or drivers are not always made available, and that it is not equipped to handle 60 foot trailers in certain States. It knows that Morgan can serve Chickasha, but the services of that car-

rier has not been used. If the instant application is granted, shipper will continue to utilize its own equipment, but allegedly private carriage operations will be curtailed. It has no intention of discontinuing the services of common carriers. Although, shipper and applicant have not agreed upon the rates to be charged, shipper believes the cost will be comparable to that of common carriers.

B & B Mobile Homes of Oklahoma City is a retail dealer in new and used mobile homes. In addition to Oklahoma City, it has places of business at Lawton, Okla., and Columbus and Biloxi, Miss. It sells or deals in new house trailers manufactured by various concerns, one of which (Vaught Industries) has plants located at Marlette, Mich., Bourbon, Ind., and Clarion, Pa. In addition, it has obtained new trailers from a depot located at Atlanta, Ga., and new or used trailers from Union City, Mich., Traveres, Fla., Texarkana, Tex., Loveland, Colo., and Hutchinson, Kans. Shipper opened the Lawton facility in May 1962, and the one in Oklahoma City about February 1962. Since the latter lot was opened, about 15 trailers have been moved there. Shipper expects to handle about 100 trailers a year at each of the two Oklahoma lots, and of this amount about 25 percent will move in interstate commerce. The services of all three protestants have been used to some degree on both inbound and outbound shipments, principally in connection with traffic moving to and from the Mississippi lots. Such carriers have handled no traffic to or from the Oklahoma City lot, but two coaches were transported by Morgan to Lawton. Shipper also has two units of equipment stationed at Columbus which along with factory transport are used to transport traffic to and from all of the lots. In connection with movements from the factory in equipment other than that owned and operated by the dealer, the manufacturer generally decides whether factor transport or regulated motor carriers will be used. Shipments of both new and used trailers may be made to any point in the

proposed area. For example recently one trailer was transported to Las Vegas, Nev., and one to Mather, Calif.

Shipper at times has found the services of protestants satisfactory, however such carriers do not expand the expando type trailers, nor do they as a general rule provide shipper with the particular driver requested. Shipper wants the services of a carrier that will provide any and all services necessary to completely set up the trailer at the point of delivery, and expects such carrier to provide equipment and drivers for its exclusive use. The services of Griffin have been used for shipments moving in intrastate commerce, and such service has been satisfactory. Shipper is interested in service principally on shipments moving to and from Oklahoma City and Lawton, and it is willing to sign a contract with applicant provided there can be a meeting of the minds on the minimum amount of traffic to be handled and the rates to be charged. Shipper expressed a desire to discontinue its private carriage.

Wheeler Trailer Exchange & Park, of Oklahoma City, deals in new, used, and salvaged house trailers. In addition, it handles coaches belonging to others on a consignment basis, and operates a 50 place trailer park. It is a franchised dealer for Melody Home of Fort Worth, and handles other new trailers which may be acquired at any point throughout the country. For example trailers have been purchased at Amarillo, Tex., Albuquerque and Grants, N. Mex., Aztec, Ariz., and at undisclosed points in Texas, Kansas, and Florida. The yearly volume of trailers moving to Oklahoma City is estimated to be 100, and outbound traffic would be about the same. This total would include salvaged or damaged trailers which have been repaired at Oklahoma City. Its transportation services are performed by two units of company equipment, and at times by Morgan, National, and Transit. In addition, Griffin's services have been used for movements within the State of Oklahoma. Shipper wants to discontinue private carriage,

and it desires the services of a motor carrier able and willing to set up the mobile homes, procure delivery receipts, and to do any other chore necessary to make the coach liveable. In other words it wants a service comparable to that provided by its own employees, and it is willing to enter into a contract with applicant provided an agreement can be reached on the minimum volume of traffic to be handled. Protestants have not been requested to perform the accessorial services which applicant would be expected to perform, but shipper is of the opinion that common carriers are unable to provide the type of service needed.

George Lane Mobile Homes deals primarily in used and damaged mobile homes at Oklahoma City. Damaged coaches are generally bought through insurance bids, and have in the past been purchased at Columbus, Toledo and Cincinnati, Ohio, and at undisclosed points in Missouri, Arkansas, Louisiana, Texas, Kansas, Colorado, and New Mexico. The used homes are purchased from dealers and others at various points in this same general area. Shipper deals in from 120 to 140 trailers a year, and such traffic is handled partly with the one piece of company owned equipment. In addition, Griffin has handled some intrastate traffic and also some movements from Oklahoma City to the State line where the traffic was interlined with an undisclosed carrier. Griffin has moved damaged expando trailers, and in addition he has handled the financial arrangements for some trailers on behalf of shipper. Some of the damaged trailers require repairs before they can be moved to the Oklahoma City lot for reconditioning, and upon occasion shipper has had to send its own employees to make these repairs. The services of a motor carrier able and willing to make repairs where needed and to provide other accessorial services is desired by shipper. The latter would enter into a contract with applicant, and it proposes to curtail and if possible discontinue the use of private carriage.

Baker Mobile Homes Sales, Inc., is engaged in the business of buying, selling, and servicing new and used mobile homes, some of which are of the expando type. In addition, it sells mobile homes for others on a consignment basis. It has sales lots at Oklahoma City and Wichita Falls and Fort Worth, Tex. Shipper deals in a number of brands of new trailers, and estimates that it handles a total of from 200 to 250 new trailers a year. Of this amount from one-half to two-thirds involve the Oklahoma City lot, and about 40 percent of the sales are made to customers located outside of Oklahoma. Used trailers handled in the course of a year total about 300, of which one-third or more are shipped to or from the Oklahoma City facility. Collectively, house trailers have been purchased at various points in Arkansas, Texas, New Mexico, Colorado, Kansas, Missouri, Mississippi, Nebraska, Oklahoma and California. Shipper owns four transportation units which are used for the movement of mobile homes to and from its respective lots. Such equipment is used principally for outbound shipments. Shipper's drivers, upon delivery, block the trailers, assemble dinette and possibly other furniture, expand the expando type homes, and at times hook up plumbing and electrical facilities. Also where needed repairs are made to used trailers before movement to the various lots. In addition to private carriage operations, shipper has used the services of Morgan and National on the movement of both new and used trailers to Oklahoma City. Their services have not been used on outbound shipments. The actual transportation services rendered by National and Morgan is considered satisfactory, but such carriers do not always furnish the same driver nor do they perform each and every service provided by shipper's own drivers or employees in connection with the private carrier operations. For example on a movement of an expando trailer by one of the protestants to a point in Kansas, shipper had to send a company employee to set the trailer up. Shipper expects applicant to perform all of the accessorial services now pro-

vided by its employees, and will enter into a contract with the carrier provided there can be an agreement with respect to the rates to be charged.

Three transporters of house trailers presented evidence in opposition to the application. Transit holds common carrier authority to transport trailers, except freight-carrying vehicles, in secondary movements, in towaway service, over irregular routes, between points in the United States, except those in Indiana. It maintains terminals or booking agents, insofar as here important, at Tulsa, Altus, Lawton, and Oklahoma City, Okla., and operates 325 pieces of leased equipment. It has three pieces of equipment stationed at Tulsa, but maintains no equipment at the three other Oklahoma terminals. This carrier also handles wrecked, disabled and damaged trailers, and provides shippers with the same drivers where requested, and also provides the extra services shown to be needed by the supporting shippers, except hooking up plumbing or electrical facilities, and expanding the expando type homes. It considers the latter services to be beyond the normal duties of a carrier engaged in the transportation business. Protestant is willing to station equipment at Oklahoma City if the volume of traffic warrants, and it desires to participate in the movement of house trailers in secondary movements.

Morgan is a common carrier with irregular route authority, insofar as here material, to transport (1) trailers designed to be drawn by passenger automobiles, in initial movements, in truckaway service, (a) from Lawton and Chickasha, Okla., to points in the United States, except Mt. Clemens, Detroit, and Flint, Mich., (b) from the site of the plant of El Reno Trailers, Inc., located approximately 8 miles south of El Reno, Okla., to points in the United States, except Mt. Clemens, Detroit, and Flint, Mich., and (2) house, cabin, and bungalow trailers, restricted to secondary movements, in truckaway and towaway service, between

points in the United States. It operates between 800 and 900 pieces of equipment, and, insofar as here important, has terminals in Oklahoma at Altus, Lawton, and Oklahoma City. Six pieces of equipment are stationed at Oklahoma City, two units at Lawton, and one at Altus. Protestant transports expando type trailers, but does not expand them. It frequently provides shippers with preferred drivers, and provides the usual accessorial services such as blocking, unblocking, and assembling furniture. This protestant has served the Chickasha manufacturer, and desires to serve all of the supporting shippers.

National holds common carrier authority, insofar as here material, to transport (1) house trailers, restricted to secondary movements, in truckaway service, between points in the United States, and (2) trailers designed to be drawn by passenger automobiles, in initial movements in truckaway service, (a) from Lawton and Chickasha to points in the United States, except Mt. Clemens, Detroit, and Flint, Mich., and (b) from Tulsa, (except from the plant site of the Sparton Aircraft Company at Tulsa), Broken Arrow, and Ponca City, Okla., to points in the United States (except points in Alaska and Hawaii). It operates around 652 leased trucks, and has terminals in Oklahoma at Tulsa, Oklahoma City, Lawton, and Altus. Protestant has stationed 18, 6, 3, and 2 trucks, respectively at the above terminal points. It transports expando and other types mobiles homes, and has served the Chickasha shipper, allegedly without complaint. It provides certain accessorial services, such as setting up house trailers on dealers' lots, and is ready and able to serve all of the supporting shippers. Protestant believes that a grant of additional authority in this area will affect its overall business.

DISCUSSION AND CONCLUSIONS

As shown, the application is supported by a manufacturer and four dealers of mobile homes. All of these shippers own some transportation equipment which is utilized in

the transportation of mobile homes to and from their places of business. Collectively, they deal in new, used, and damaged trailers, and their own drivers in making deliveries completely set up the trailers on dealers' lots or at purchasers' home sites. This setting-up service may entail blocking, unblocking, assembling dinette sets or other furniture, connecting electrical and plumbing facilities, making minor repairs, and expanding the expando type homes. Generally, shippers want applicant to provide equipment, as well as drivers, for their exclusive use, and to perform the above as well as any other accessorial service which they themselves usually perform. They have not used for-hire carriers to any great extent, and their chief complaints or beliefs are that existing common carriers do not always furnish the driver or drivers requested, and that such carriers do not or cannot provide all of the accessorial services necessary for successful disposal of their mobile homes. With minor exceptions, the dealers supporting the application failed to designate the specific points in which the initial movements would originate, nor was the past as expected volume from such points given.

In determining whether the proposed service is contract carriage, and if so whether the issuance of a permit will be consistent with the public interest and the national transportation policy consideration must be given to the provisions of section 203(a)(15) and 209(b). In No. MC-117957 (Sub-No. 1) *Carlton M. Moyer Contract Carrier Application,* M.C.C. , (decided March 22, 1962), the Commission outlined the proper methods to be utilized in applying the statutory requirements of these two sections of the Act, in light of the Supreme Court's decision in *Interstate Commerce Commission* v. *J-T Transport Co.,* 368 U.S. 81 (1961). The Commission pointed out that the first step is to determine whether the proposed operation would be that of a contract carrier by reason of the "exclusive assignment of vehicles" and the "distinct need"

tests as prescribed in section 203(a)(15).[1] Applicant proposes a service for a limited number of shippers, under continuing contracts, for the furnishing of transportation through the assignment of its motor vehicles and drivers for the exclusive use of shippers, and the transportation (plus the accessorial services) would be rendered to meet the express needs of each shipper. The proposed service would, in the examiner's opinion, be that of a contract carrier as prescribed in section 203(a)(15).

Upon reaching the conclusion that the proposed service is contract carriage, then consideration must be given to the five criteria contained in section 209(b). This section, insofar as here pertinent, provides:

> In determining whether issuance of a permit will be consistent with the public interest and the national transportation policy declared in this Act, the Commission shall consider (1) the number of shippers to be served by the applicant, (2) the nature of the service proposed, (3) the effect which granting the permit would have upon the services of the protesting carriers, (4) the effect which denying the permit would have upon the applicant and/or its shipper, and (5) the changing character of that shipper's requirement . . . .

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[1]This portion of the Act reads as follows:

> The term "contract carriage by motor vehicle" means any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation (other than transportation referred to in paragraph (14) and the exception therein), under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer.

With respect to the five criteria outlined above, it is clear that applicant proposes to serve a limited number of shippers and that it proposes to provide services tailored to meet the express desires of the shippers. The effect that denying of the permit would have upon applicant presents no serious problem since it holds no authority in its own right from the Commission. There has been no particular change in the character of shippers requirements since they rely principally on private carriage, and have used the services of protesting common carriers for only a small amount of their traffic, either inbound or outbound. The main questions for consideration are what effect a denial of the application would have upon the shippers, and what effect a grant of any authority would have upon the protestants. Shippers evidence concerning the territory in which the traffic would move is somewhat indefinite, and considering this fact along with statements that certain of the shippers would continue to utilize their their own vehicles, it does not appear that a denial would have any material adverse effect upon shippers. On the other hand, protestants, do not offer all of the accessorial services desired by the shippers. They are not handling much traffic for shippers, and at first glance it would appear that a grant would not materially affect their overall operations. It must be born in mind, however, that protestants are motor common carriers experienced in the transportation of mobile homes, and they hold extensive authority from the Commission. They perform or are willing to perform all of the accessorial services desired, except repairing trailers, expanding the expando type homes, and the hooking-up of electrical and plumbing facilities. It is the position of some protestants that the latter services are matters wholly unrelated to transportation and therefore can not be performed by regulated motor carriers.

The services contemplated under sections 203(a)(15) and 209(b) of the Act relate to transportation, and the question

which must be considered is whether shippers, in conjunction with applicant, can in order to acquire the services of a contract carrier add so called accessorial services which go beyond what is required of carriers to meet the requirements of the public interest and the national transportation policy. It is noted that applicant's proposal is not geared to aid production and the distribution of trailers from the standpoint of an on-call expedited service, rather, it is geared to the promotion and sale of trailers. There appears to be considerable merit in protestants arguments that certain of the accessorial services to be performed by applicant exceeds those normally connected with transportation.

The examiner is of the opinion that a service tailored to meet a shipper's distinct need must involve services normal to the industry and incidental to transportation. In *Petroleum Carrier Corporation Extension—Panama City, Fla.*, 82 M.C.C. 573, the Commission, Division 1, in dealing with an accessorial service which was not a part of transportation, said:

> "The auxiliary service proposed by applicant would, if allowed as the basis for the grant of authority, encourage those seeking to enter the transportation field to propose novel non-transportation services as a means of thwarting the effort of existing carriers to provide economical and efficient service within the scope of their authorities."

Although, the above case involved a common carrier, the principle established therein is equally applicable to contract carriers. Protestants can provide the reasonable transportation requirements of shippers, and the examiner concludes that the application should be denied.